Supreme Court, U.S.
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October 1, 2008 Term

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In The

Supreme Court

of the United States of America

In re
J. KAMAU CHRISTOPHER a/k/a
JOSEPH KAMAU CHRISTOPHER BEY,
Petitioner,

v.

NORTH CAROLINA STATE UNIVERSITY, ET AL.,
Respondent.

ON PETITION FOR A WRIT OF MANDAMUS, WRIT OF PROHIBITION, AND A MANDANTORY INJUNTION TO THE SUPREME COURT OF NORTH CAROLINA, GENERAL COURT OF JUSTICE OF NORTH CAROLINA

EMERGENCY PETITION FOR WRIT OF MANDAMUS, PETITION FOR WRIT OF PROHIBITION, AND PETITION FOR A MANDATORY INJUNTION

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DECEMBER 19, 2008

Petitioner, Pro Se

THE QUESTIONS PRESENTED FOR REVIEW

Petitioner presents five questions for review by the Supreme Court of the United States as to whether the due process and equal protection rights of Petitioner as guaranteed by the Fourteenth Amendment of the United States, U.S. Const. Amend XIV, were violated by the following:

(i) The suspension of discovery and the hearing of Respondent's Motion for Summary Judgment before the close of evidence;

(ii) The failure of the North Carolina Industrial Commission and the General Court of Justice of North Carolina to provide relief by injunction and intervention to prevent Respondent from destroying evidence relevant to these proceedings during the pendency of these proceedings, and the subsequent destruction of evidence relevant to these proceedings during the pendency of these proceedings;

(iii) The failure of the North Carolina Industrial Commission and the General Court of Justice of North Carolina to adjudicate the objections of Petitioner as to the genuine issues of material fact and triable issues of fact as to the time, place, circumstance and nature of the personal injury of Petitioner in question presented at the hearing for Respondent's Motion for Summary Judgment;

(iv) The opinion, decision and dismissal classifying Petitioner as subject to the exclusive remedies of the North Carolina Workers' Compensation Act without validation or certification that the personal injury of Petitioner qualified for such remedies; and

(v) The opinion, decision and dismissal eliminating Petitioner's common law claim for civil remedy against his employer, Respondent, pursuant to the exclusivity provisions of the North Carolina Workers' Compensation Act, without adjudicating if the North Carolina Workers' Compensation Act provided an effective administrative remedy.

PARTIES TO THIS PROCEEDING

Petitioner in this matter is J. Kamau Christopher a/k/a Joseph Kamau Christopher Bey, represented *Pro Se.*

Respondent Courts in this matter are the Supreme Court of North Carolina, General Court of Justice of North Carolina; the Court of Appeals of North Carolina, General Court of Justice of North Carolina; and the North Carolina Industrial Commission, North Carolina Department of Commerce.

Respondent in this matter is the State of North Carolina; The Government of the State of North Carolina; Michael F. Easley, In His Official Capacity as the Governor of the State of North Carolina, Principle Executive Officer of the Executive Branch of the Government of the State of North Carolina; and other duly authorized officers, agents and employees of the Government of the State of North Carolina acting in their official capacity in the scope of their employment as public servants; The University of North Carolina; Erskine B. Bowles, In His Official Capacity as President, Principle Executive Officer of the General Administration of the University of North Carolina; and other duly authorized officers, agents and employees of the University of North Carolina acting in their official capacity in the scope of their employment as public servants; North Carolina State University, constituent institution of the University of North Carolina; James L. Oblinger, In His Official Capacity as the Chancellor, Principle Executive Officer of North Carolina State University; Marye Anne Fox,

In Her Official Capacity as the former Chancellor, Principle Executive Officer of North Carolina State University; Charles Leffler, in His Official Capacity as Vice Chancellor for Finance and Business, Office of Finance and Business, North Carolina State University; Kevin J. MacNaughton, in His Official Capacity as Associate Vice Chancellor for Facilities, Division of Facilities, Office of Finance and Business, North Carolina State University; Bruce L. MacDonald, in His Official Capacity as Health & Safety Manager, Environmental Health & Safety Center, North Carolina State University; Thomas H. Stafford, in His Official Capacity as Vice Chancellor for Student Affairs, Office of Student Affairs, North Carolina State University; Timothy Luckadoo, Ph.D., in His Official Capacity as Associate Vice Chancellor for University Housing, University Housing, Office of Student Affairs, North Carolina State University; Susan Grant, Director of University Housing, University Housing, North Carolina State University; Gary Thompson, in His Official Capacity as former Assistant Director of Facility Operations, University Housing, and former Associate Director of Facility Operations, University Housing, Office of Student Affairs, North Carolina State University; Timothy Blair, in His Official Capacity as former Assistant Director for Avent Ferry Complex and Wood Hall, East Campus, former Associate Director of East Campus, current Associate Director of University Apartments, University Housing, Office of Student Affairs, North Carolina State University; and other duly authorized officers, agents and employees of the North Carolina State University acting in their official capacity in the scope of their employment as public servants.

Counsel for the Respondent is Dahr Joseph Tanoury, Esq., Assistant Attorney General, Tort Claims Section, Office of the Attorney General of the State of North Carolina; Elizabeth W. Riley, Esq., Deputy Legal Counsel, Office of Legal Counsel, Office of the Governor of the State of North Carolina; Laura Bernstein Luger, Esq., Vice President and General Counsel, The University of North Carolina System General Administration; David T. Drooz, Senior Associate General Counsel, Office of Legal Affairs, North Carolina State University.

Note: In the original affidavit of tort claim, which initiated this action, Respondent was cited as North Carolina State University, with statutory reference to negligent acts performed by officers, agents and/or employees of Respondent in their official capacity as public servants. See N.C. Gen. Stat. § 143-291 et seq. Pursuant to the controlling law and statutory authority, the executive authority of Respondent is exclusively vested in the Governor of the State of North Carolina and derives from the Constitution of the State of North Carolina, and controlling law and legal authority for the public entity of North Carolina State University designates Respondent as subject to executive authority and a constituent institution of the University of North Carolina. See N.C. Const. art. IX, § 8; N.C. Gen. Stat. § 116-1 et seq.

TABLE OF CONTENTS

Section	Page
Questions presented for review	i
Parties to this Proceeding	iii
Table of Contents	vi
Table of Authorities	x
Petition for Writ of Mandamus, Petition for Writ of Prohibition, Petition for a Mandatory Injunction	1
Opinions Below	1
Jurisdiction	2
Statutory Provisions Involved	2
Introduction	3
Statement of Case	4
I. Summary of Federal Question	4
II. Statutory Background	7
III. Factual Background	13

Table of Contents – Continued:

IV. Procedural History 18

V. Relief Sought 24

Justification for Grant of This Writ 25

I. This relief sought involved alleged due process violations under the appellate jurisdiction of this Court, and, appeal does not provide adequate relief for said violations, thus urgent and immediate extraordinary relief is required 25

II. The Petitioner has presented clear and convincing evidence that this matter involves an issue of public importance and appellate jurisdiction will be impaired without extraordinary relief 29

III. As the Petitioner has exhausted all administrative remedies and no other remedy exists, this Court has an independent jurisdiction to review this matter on appeal and provide the extraordinary relief sought herein 31

Conclusion 32

INDEX TO APPENDICES

Appendix	Page
Appendix A: *Christopher v. N.C. State Univ.*, No. TA-19383, Or. (N.C. Industrial Commission 9 February 2007)	1a
Appendix B: *Christopher v. N.C. State Univ.*, No. TA-19383, Or. (N.C. Industrial Commission 10 August 2007)	7a
Appendix C: *Christopher v. N.C. State Univ.*, No. P07-907, Or. (N.C. Ct. App. 14 November 2007)	14a
Appendix D: *Christopher v. N.C. State Univ.*, No. COA07-1516, slip op. (N.C. Ct. App. 20 May 2008)	16a
Appendix E: *Christopher v. N.C. State Univ.*, No. 246-P08, Orders (N.C. S. Ct. 4 September 2008)	23a
Appendix F: *Christopher v. N.C. State Univ.*, No. COA246-P08, Plaintiff-Appellant's Motion for Temporary Stay, Motion to Amend the Record on Appeal, and Motion to Expedite this Appeal (N.C. Ct. App. 22 August 2008)	26a

Index to Appendices – Continued:

Appendix G: North Carolina State University Facility Profile and Ten-Year Capital Plan, published by Eva Klein & Associates, December 1999 (excerpts therefrom) 46a

Appendix H: Administrative Memorandum prepared by Petitioner, as employee, and submitted to Respondent, as employer, dated October 8, 2002 (redacted as appropriate) 52a

Appendix I: Letter from Respondent to Petitioner of January 23, 2004 ..... 55a

Appendix J: Letter from Respondent to Petitioner of June 23, 2008 ..... 57a

Appendix K: Letter from Respondent to Petitioner of July 24, 2008 ..... 67a

Appendix L: Letters from Respondent to Petitioner of August 15, 2008 and August 18, 2008 ..... 72a

Appendix M: Letters from Respondent to Petitioner of September 2, 2008 and September 3, 2008 ..... 76a

Index to Appendices – Continued:

Appendix N: Letters from Respondent to Petitioner of September 24, 2008 and September 30, 2008 ..... 78a

Final Page of the Appendix N is on page 88a

TABLE OF CITED AUTHORITIES

Cases: **Page**

Application of President & Directors of Georgetown College, Inc., 331 F.2d 1000 (App. Dis. Col. 1964), *reh. den.*, 331 F.2d 1010 (App. Dis. Col. 1964), *cert. den.*, 377 U.S. 978, 12 L. Ed. 2d 746, 84 S. Ct. 1883 (1964) 8

Aref v. United States, 452 F3d 202 (2nd Cir. 2006) 9

Association for Reduction of Violence v. Hall, 734 F.2d 63 (1st Cir. 1984) 28

Baker Perkins, Inc. v. Werner & Pfleiderer Corp., 710 F.2d 1561 (Fed. Cir. 1983) 9, 10

Belbacha v. Bush, 520 F.3d 452 (App. Dis. Col. 2008) 12

Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969) 25

Cases – Continued:

Boulder v. Lewis, 21 F2d 910 (8th Cir. 1927) 11

Brown v. Motor Inns of Carolina, Inc., 47 N.C. App. 115, 266 S.E.2d 848 (1980), *cert. denied*, 301 N.C. 86 (1980) 4

Brown v. Thompson, 430 F.2d 1214 (5th Cir. 1970) 28

Burns v. Thiokol Chemical Corp., 483 F.2d 300 (5th Cir. 1973) 26

Burns, Trevino v. Celanese Corp., 701 F.2d 397 (5th Cir. 1983) 25, 27

California v. United States District Court, 213 F.2d 818 (9th Cir. 1954) 7

Chandler v. Judicial Council of Tenth Circuit, 398 U.S. 74, 26 L. Ed. 2d 100, 90 S. Ct. 1648 (1970), *reh. den.*, 399 U.S. 937, 26 L. Ed. 2d 809, 90 S. Ct. 2248 (1970) 9

Chase v. Robson, 435 F2d 1059 (7th Cir. 1970) 12

Cheney v. United States Dist. Court, 542 U.S. 367, 159 L. Ed. 2d 459, 124 S. Ct. 2576 (2004) 11, 12

Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095 (9th Cir. 1990) 9

Coughlin v. Lee, 946 F.2d 1152 (5th Cir. 1991) 25

Cases – Continued:

Crown Zellerbach Corp. v. Federal Trade Com., 156 F.2d 927 (9th Cir. 1964) 8

Dunlavey v. Economy Fire & Casualty Co., 887 F.2d 893 (8th Cir., 1989) 6

Estate of Whitlock v. Commissioner, 547 F.2d 506 (10th Cir. 1976), *cert. den.*, 430 U.S. 916, 51 L. Ed. 2d 594, 97 S. Ct. 1329 (1977) 9

Ex parte Abernathy, 320 U.S. 219, 88 L. Ed. 3, 64 S. Ct. 13 (1943) 11

Ex parte Farrell, 189 F.2d 540 (1st Cir. 1951), *cert. den.*, 342 U.S. 839, 96 L. Ed. 634, 72 S. Ct. 64 (1951) 8

Ex parte Republic of Peru, 318 U.S. 578, 87 L. Ed. 1014, 63 S. Ct. 793 (1943) 9

Ex parte Riddle, 255 U.S. 450, 65 L. Ed. 725, 41 S. Ct. 370 (1921) 9

Eyre v. McDonough Power Equip., Inc., 755 F.2d 416, 419 (5th Cir. 1985) 25

First Jersey Secur., Inc. v. Bergen, 605 F.2d 690 (3rd Cir. 1979), *cert. den.*, (1980) 444 U.S. 1074, 62 L. Ed. 2d 756, 100 S. Ct. 1020 (1980) 9, 10

Fisher v. Delehant, 250 F.2d 265 (8th Cir. 1957) 11

Cases – Continued:

Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970), *cert. denied*, 401 U.S. 974, 91 S. Ct. 1191, 28 L. Ed. 2d 323 (1971) 28

Green v. Occidental Petroleum Corp., 541 F.2d 1335 (9th Cir. 1976) 8

Harris v. Gibson, 322 F.2d 780 (5th Cir. 1963), *cert. den.*, 376 U.S. 908, 11 L. Ed. 2d 606, 84 S. Ct. 661 (1964) 12

Hartley Pen Co. v United States Dist. Court, 287 F.2d 324, (9th Cir. 1961) 11, 12

Heflin v. United States, 358 U.S. 415, 3 L. Ed. 2d 407, 79 S. Ct. 451 (1959) 8

Henderson Tire & Rubber Co. v. Reeves, 14 F.2d 903 (8th Cir. 1926), *cert. den.*, 273 U.S. 744, 71 L. Ed. 870, 47 S. Ct. 336 (1927) 8, 12

Hill v. United States, 368 U.S. 424, 7 L. Ed. 2d 417, 82 S. Ct. 468 (1962) 8

Illinois Council on Long Term Care, Inc. v. Shalala, 143 F.3d 1072 (7th Cir. 1998) 10

In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act, 92 N.C. App. 1, 373 S.E.2d 572 (1988), rev'd on other grounds, 324 N.C. 373, 379 S.E.2d 30 (1989) 18

In re Atlantic City Railroad, 164 U.S. 633, 41 L. Ed. 579, 17 S. Ct. 208 (1897) 9

Cases – Continued:

In re Baldwin-United Corp. (Single Premium Deferred Annuities Ins. Litigation), 770 F.2d 328 (2nd Cir. 1985) .. 10

In re Cheney, 334 F.3d 1096 (App. Dis. Col. 2003), *vacated, remanded*, 542 U.S. 367, 159 L. Ed. 2d 459, 124 S. Ct. 2576 (2004) 10

In re Eastern Cherokees, 220 U.S. 83, 55 L. Ed. 379, 31 S. Ct. 373 (1911) 11

In re Eilers Music House, 284 F. 815 (9th Cir. 1922) 8

In re Garrosi, 229 F. 363 (1st Cir. 1916) ... 9

In re Glaser, 198 U.S. 171, 49 L. Ed. 1000, 25 S. Ct. 653 (1905) 8

In re Grand Jury Proceedings of United States, 626 F.2d 1051 (1st Cir. 1980) 12

In re Heilbroner, 69 F.2d 643 (2nd Cir. 1934); 8

In re Lisman, 89 F.2d 898 (2nd Cir. 1937) 12

In re Massachusetts, 197 U.S. 482, 49 L. Ed. 845, 25 S. Ct. 512 (1905) 8

In re Melvin, 546 F.2d 1 (1st Cir. 1976) 11

In re Ojeda Rios, (1988, CA2) 863 F.2d 202 (2nd Cir. 1988) 9

Cases – Continued:

In re Special March 1974 Grand Jury, etc., 541 F.2d 166 (7th Cir. 1976), *cert. den.*, 430 U.S. 929, 51 L. Ed. 2d 773, 97 S. Ct. 1547 (1977) 11

In re United States, 397 F.3d 274 (5th Cir. 2005), *stay lifted, remanded*, 400 F.3d 277 (5th Cir. 2005), *cert. den.*, 161 L. Ed. 2d 289 (2005) 10

International Business Machines Corp. v. United States, 480 F.2d 293 (2nd Cir. 1973), *cert. den.*, 416 U.S. 979, 40 L. Ed. 2d 776, 94 S. Ct. 2413 (1974), *cert. den.*, 416 U.S. 980, 40 L. Ed. 2d 777, 94 S. Ct. 2413 (1974) 11

ITT Community Development Corp. v. Barton, 569 F.2d 1351 (5th Cir. 1978) 11

Jackson v. Choate, 404 F2d 910 (5th Cir. 1968) 11

John Gund Brewing Co. v. United States, 204 F. 17 (8th Cir. 1913), *mod.*, 206 F. 386 (8th Cir. 1913) 11

Johnson and Smith v. First Union Corporation, 128 N.C. App. 450, 496 S.E.2d 1 (1998), cert. denied, 351 N.C. 648; 543 S.E.2d 870 (2000) 4

Keaton v. Kennamer, 42 F.2d 814 (10th Cir. 1930) 8

Cases – Continued:

Kerr v. United States Dist. Ct. for Northern Dist., 511 F.2d 192 (9th Cir. 1975), *affirmed*, 426 U.S. 394, 96 S. Ct. 2119, 48 L. Ed. 2d 725 (1976) 28

Lucas v. United States, 36 F.2d 1015 (App. Dis. Col. 1929) 11, 12

Marshall v. Westinghouse Electric Corp., 576 F.2d 588 (5th Cir. 1978) 27

McClellan v. Carland, 217 U.S. 268, 54 L. Ed. 762, 30 S. Ct. 501 (1910) 8

Merrimack River Sav. Bank v. Clay Center, 219 U.S. 527; 31 S. Ct. 295; 55 L. Ed. 320 (1911) 29

Michigan Ass'n of Homes & Servs. for the Aging v. Shalala, 127 F.3d 496 (6th Cir. 1997) 10

Moor v. Texas & N. O. R. Co., 297 U.S. 101, 80 L. Ed. 509, 56 S. Ct. 372 (1936) 7

Morrison v. Work, 266 U.S. 481, 69 L. Ed. 394, 45 S. Ct. 149 (1925) 7

Muir v. Chatfield, 255 F. 24 (2nd Cir. 1918) 8

Mutual Life Ins. Co. v. Holly, 135 F.2d 675 (7th Cir. 1943) 8

New York C. R. Co. v. White, 243 U.S. 188, 37 S. Ct. 247, 61 L. Ed. 667 (1917) 4

Cases – Continued:

New York v. Shore Realty Corp., 763 F.2d 49 (2nd Cir. 1985) 10

O'Neal v. Riceland Foods, 684 F.2d 577 (8th Cir. 1982) 26

Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 98 S. Ct. 2380, 57 L. Ed. 2d 253 (1978) 26

Parr v. United States, 351 U.S. 513, 100 L. Ed. 1377, 76 S. Ct. 912 (1956), *reh. den.*, 352 U.S. 859, 1 L. Ed. 2d 69, 77 S. Ct. 21 (1956) 9

Petition of Henneman, 137 F.2d 627 (1st Cir. 1943) 8

Pratt v. Stout, 85 F.2d 172 (8th Cir. 1936) 7

Public Utilities Com. v. Capital Transit Co., 214 F.2d 242 (App. Dis. Col. 1954) 11

Rich v. Martin Marietta Corp., 522 F.2d 333 (10th Cir. 1975) 27

Roach v. First Nat'l Bank, 84 F.2d 969 (5th Cir. 1936) 7

Sanders v. Shell Oil Co., 678 F.2d 614 (5th Cir. 1982) 25

SEC v. Torr, 87 F.2d 446 (2nd Cir. 1937) .. 10

Sinclair Refining Co. v. Mid'and Oil Co., 55 F.2d 42 (4th Cir. 1932) 7

Cases – Continued:

Snauffer v. Stimson, 155 F2d 861 (App. Dis. Col. 1946) 11

Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor, 619 F.2d 231 (3rd Cir. 1980), cert. den., 449 U.S. 1096, 66 L. Ed. 2d 824, 101 S. Ct. 893 (1981) 10

Swanner v. United States, 406 F.2d 716 (5th Cir. 1969) 28

Tanner v. McCall, 625 F.2d 1183 (5th Cir. 1980) 27

Trautwein v. Moreno Mut. Irr. Co., 22 F.2d 374 (9th Cir. 1927) 7

United States Alkali Export Ass'n v. United States, 325 U.S. 196, 89 L. Ed. 1554, 65 S. Ct. 1120 (1945) 9

United States v. Carter, 270 F.2d 521 (9th Cir. 1959) 11, 12

United States v. Hall, 145 F2d 781 (9th Cir. 1944), *cert. den.*, 324 U.S. 871, 89 L. Ed. 1425, 65 S. Ct. 1016 (1945) 8

United States v. Mellon Bank, N. A., 545 F.2d 869 (3rd Cir. 1976) 11

United States v. New York Tel. Co., 434 U.S. 159, 54 L. Ed. 2d 376, 98 S. Ct. 364 (1977) 9

United States v. Salinas, 693 F.2d 348 (5th Cir. 1982) 9

Cases – Continued:

United States v. Sorren, 605 F.2d 1211 (1st Cir. 1979) 10

United States v. United States Dist. Court, 206 F.2d 303 (9th Cir. 1953) 12

Vuitton et Fils S.A. v. J. Young Enterprises, Inc., 644 F.2d 769 (9th Cir. 1981) 7

Waddell v. Alldredge, 480 F2d 1078 (3rd Cir. 1973) 9

Weahkee v. Norton, 621 F.2d 1080 (10th Cir. 1980) 27

Westchester Day Sch. v. Village of Mamaroneck, 386 F.3d 183 (2nd Cir. 2004) 10

Zell v. Judges of Circuit Court, 149 F. 86 (4th Cir. 1906) 8

Constitutional Provisions, Statutes and Rules:

Fed. Rule of Evid. 501 28

N.C. Const. art. I 18

N.C. Const. art. III 18

N.C. Const. art. IV 18, 24

N.C. Const. art. IX v

N.C. Gen. Stat. § 1A-1, (N.C. R. Civ. P.) Rule 26 et seq. 26, 28

Constitutional Provisions, etc. – Continued:

N.C. Gen. Stat. § 7A-1 et seq 18

N.C. Gen. Stat. § 7A-25 24

N.C. Gen. Stat. § 7A-26 24

N.C. Gen. Stat. § 7A-29 21

N.C. Gen. Stat. § 7A-30 23

N.C. Gen. Stat. § 7A-31 23

N.C. Gen. Stat. § 7A-32 ..... 21, 23

N.C. Gen. Stat. § 97-1 et seq ..... ii, 4, 5, 18, 20, 27

N.C. Gen. Stat. § 97-10.1 ..... 5, 18, 20

N.C. Gen. Stat. § 97-77 18

N.C. Gen. Stat. § 116-1 et seq. v

N.C. Gen. Stat. § 143-291 et seq. ..... v, 18

N.C. Gen. Stat. § 143B-1 et seq. 18

28 U.S.C. § 1257 ..... 1, 2

28 U.S.C. § 1651 ..... 1, 2, 7, 12

U.S. Const. amend. XIV § 1 ..... i, 2, 5, 22

U.S. Const. art. III 2

EMERGENCY
PETITION FOR WRIT OF MANDAMUS
PETITION FOR WRIT OF PROHIBITION
PETITION FOR A MANDATORY INJUNTION

Pursuant to the Rules of this Court and the All Writs Act (28 U.S.C. §§ 1257, 1651), J. KAMAU CHRISTOPHER a/k/a JOSEPH KAMAU CHRISTOPHER BEY (hereinafter referred to as the "Petitioner") hereby respectfully petitions the SUPREME COURT OF THE UNITED STATES to take any emergency action appropriate to preserve appellate jurisdiction and prevent undue and abusive prejudice against the Petitioner pending review of the final judgment in this matter entered by the SUPREME COURT OF NORTH CAROLINA in favor of NORTH CAROLINA STATE UNIVERSITY, as a subordinate public office and entity in the GOVERNMENT OF THE STATE OF NORTH CAROLINA (hereinafter colléctively referred to as the "State of North Carolina", the "State", the "Government", individually, or collectively and jointly, the "Respondent" or "Respondents").

OPINIONS BELOW

The opinions and orders of the SUPREME COURT OF NORTH CAROLINA are unpublished (Pet. App. 23a-25a). The opinions and orders of the COURT OF APPEALS OF NORTH CAROLINA are unpublished (Pet. App. 14a-22a). The opinions and orders of the NORTH CAROLINA INDUSTRIAL COMMISSION are unreported (Pet. App. 1a-13a).

JURISDICTION

On September 4, 2008, the SUPREME COURT OF NORTH CAROLINA entered a judgment and order dismissing the Notice of Appeal and denying the Petition for Discretionary Review upon Certification filed by Petitioner (Pet. App. 23a-25a, 26a-71a). No pleading was filed with, nor order made by, the SUPREME COURT OF NORTH CAROLINA, with respect to a rehearing of this matter. This Court is authorized to review a federal question, and take any and all necessary extraordinary measures to aid said appellate jurisdiction, where a state court of last resort has passed on said question alleging the violation of any reserved and guaranteed rights, privileges, and immunities under the Constitution of the United States of America and the All Writs Act. See U.S. Const. art. III; 28 U.S.C. §§ 1257, 1651.

STATUTORY PROVISIONS INVOLVED

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV § 1.

INTRODUCTION

The Petitioner hereby respectfully petitions the SUPREME COURT OF THE UNITED STATES to take any action appropriate to preserve appellate jurisdiction and prevent undue and abusive prejudice against the Petitioner pending review of the final judgment in this matter entered by the SUPREME COURT OF NORTH CAROLINA in favor of the Respondent affirming judgment dismissing the instant action filed with the NORTH CAROLINA INDUSTRIAL COMMISSION with prejudice (Pet. App. 1a-25a). The Petitioner has presented contemporaneously herewith a Petition for Writ of Certiorari showing that this Court has appellate jurisdiction in this matter, and that this matter involves an violation of the Constitution of the United States of America, which is of public importance and crucial to jurisprudence in every jurisdiction under the Constitution of the United States of America (Pet. App. 26a-88a, Record 293-297). In preservation of this appellate jurisdiction, and to prevent any further prejudice against the Petitioner, this prayer for extraordinary relief respectfully requests all necessary action through mandate, prohibition and injunction to preserve the record and appellate jurisdiction of this Court. See Pet. App. 1a-88a; Record 32-175 (Petitioner's Response to Respondent's Motion for Summary Judgment and Motion to Suspend Discovery, and Petitioner's Cross Motion to Compel Discovery), 177-213, 280 (Petition for Extraordinary Relief before the North Carolina Court of Appeals), 291-297 (Assignments of Error for Appeal before the North Carolina Court of Appeals).

STATEMENT OF CASE

I. Summary of Federal Question

The decisions below presents significant federal questions as to the constitutional validity of exclusions and immunities provided to employers and co-employees by universally mandated exclusive legislative industrial insurance programs, commonly referred to as "workers' compensation" (hereinafter referred to as the "Programs"). In *New York C. R. Co. v. White*, 243 U.S. 188, 37 S. Ct. 247, 61 L. Ed. 667 (1917), this Court held that the Programs are not repugnant to the provisions of the Constitution, so long as the Programs provide an "adequate substitute" for the prohibited common law claims for civil remedy for personal injury by industrial accident in the workplace. The GENERAL COURT OF JUSTICE OF NORTH CAROLINA, comprised of the SUPREME COURT OF NORTH CAROLINA (hereinafter referred to as the "N.C. Supreme Court"), the COURT OF APPEALS OF NORTH CAROLINA (hereinafter referred to as the "N.C. Court of Appeals"), and various superior and district courts covering all jurisdictions within the State of North Carolina (hereinafter collectively referred to as the "N.C. Courts"), has applied this principle in *Johnson and Smith v. First Union Corporation*, 128 N.C. App. 450, 496 S.E.2d 1 (1998), cert. denied, 351 N.C. 648; 543 S.E.2d 870 (2000) and *Brown v. Motor Inns of Carolina, Inc.*, 47 N.C. App. 115, 266 S.E.2d 848 (1980), cert. denied, 301 N.C. 86 (1980), where it was held that if the North Carolina Workers' Compensation Act (hereinafter referred to as the "N.C.W.C.A.") has no application and does not

provide an "effective administrative remedy", the N.C.W.C.A. and the exclusivity provisions thereof have no application or effect to bar a common law claim for civil remedy against an employer or co-employee. See N.C. Gen. Stat. § 97-1 et seq.

In the instant case, Petitioner duly presented numerous objections showing that, despite the fact that Petitioner was employee of Respondent at a certain time in question with respect to the personal injury in question, the N.C.W.C.A. does not provide an effective administrative remedy, and thus has no application to bar the common law claim for civil remedy filed against Respondent in the instant case (Record 32-175, 177-213, 280, 291-297). Despite these objections, the N.C. Courts passed on this appeal and these federal questions without adjudication of the objections presented and without significant or adequate finding of fact on the personal injury in question (Pet. App. 1a-25a). This dismissal was based solely on the grounds of the relationship between Petitioner and Respondent (Pet. App. 1-25a, Record 32-297).

Petitioner contends that N.C.W.C.A. does not provide an adequate substitute for a common law claim for civil remedy in the instant case, and, thus, this decision does not comport with the previous holdings of this Court to insure that the interpretation and official action in invoking the relevant provisions of the N.C.W.C.A. complies with the provisions of the Constitution of the United States of America, primarily the Fourteenth Amendment provisions for due process and equal protection (Pet. App. 26a-71a, Record 32-175, 177-213, 280, 291-297). Moreover, the U.S. Court of Appeals has also held that a crucial federal question

exist as to if all remedies at law can be eliminated by the exclusivity provisions of a workers' compensation law where workers' compensation is ineffective. *Dunlavey v. Economy Fire & Casualty Co.*, 887 F.2d 893 (8th Cir., 1989). Various state courts of last resort have also decided this important federal question, but there are widespread inconsistencies between the construction of the relevant statutes, the remedies provided, and the exceptions to the relevant exclusivity provisions. In many jurisdictions, the original concept of the Programs was to provide employees with guaranteed benefits for injuries in the workplace. At present, the Programs provide employers with immunity from all liability, even if the employee's benefits provided by the Programs are not an adequate substitute for the forfeiture of common law remedy, and without regard for employees' rights to due process. It is critical that this Court address these inconsistencies to insure that constitutional protections provided to all citizens of the United States are not violated by the letter of, or official state action in administration of, the Programs. Prayer for review by appeal was submitted contemporaneously with this prayer for extraordinary relief.

This prayer for extraordinary relief respectfully petitions this Court to provide appropriate relief in light of clear, convincing and uncontroverted evidence that the Respondent willfully and intentionally destroyed documentary and physical evidence relevant to these proceedings during the pendency of these proceedings, and that the Petitioner will be further prejudiced without immediate action to prevent further prejudice and impairment of appellate jurisdiction.

II. Statutory Background

In passing the All Writs Act of 1938, Congress revised and codified Sections 342 and 377 of the Judicial Code into Section 1651 (hereinafter the "All Writs Act", as currently codified with the provisions as amended in 1948 and 1949). The All Writs Act provides this Court, and all other courts created by Act of Congress, with the power to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." See 28 U.S.C. § 1651.

Appellate courts have inherent power to make, in its discretion, such orders as may be necessary to preserve status quo between parties until final disposition of any pending appeal. *Vuitton et Fils S.A. v. J. Young Enterprises, Inc.*, 644 F.2d 769 (9th Cir. 1981). Power of mandamus or prohibition is reserved for use in those rare instances when appellate jurisdiction would be adversely affected unless action is taken. *California v. United States District Court*, 213 F.2d 818 (9th Cir. 1954). Extraordinary remedial writs are not a matter of right, but an exercise of sound judicial discretion. See *Morrison v. Work*, 266 U.S. 481, 69 L. Ed. 394, 45 S. Ct. 149 (1925); *Moor v. Texas & N. O. R. Co.*, 297 U.S. 101, 80 L. Ed. 509, 56 S. Ct. 372 (1936); *Trautwein v. Moreno Mut. Irr. Co.*, 22 F.2d 374 (9th Cir. 1927); *Sinclair Refining Co. v. Midland Oil Co.*, 55 F.2d 42 (4th Cir. 1932); *Roach v. First Nat'l Bank*, 84 F.2d 969 (5th Cir. 1936); *Pratt v. Stout*, 85 F.2d 172 (8th Cir. 1936).

A federal court, including this Court, must have appellate jurisdiction over a matter to consider granting a petition for writ of extraordinary relief.

See *In re Massachusetts*, 197 U.S. 482, 49 L. Ed. 845, 25 S. Ct. 512 (1905); *In re Glaser*, 198 U.S. 171, 49 L. Ed. 1000, 25 S. Ct. 653 (1905); *McClellan v. Carland*, 217 U.S. 268, 54 L. Ed. 762, 30 S. Ct. 501 (1910); *Heflin v. United States*, 358 U.S. 415, 3 L. Ed. 2d 407, 79 S. Ct. 451 (1959); *Hill v. United States*, 368 U.S. 424, 7 L. Ed. 2d 417, 82 S. Ct. 468 (1962); *Zell v. Judges of Circuit Court*, 149 F. 86 (4th Cir. 1906); *Muir v. Chatfield*, 255 F. 24 (2nd Cir. 1918); *In re Eilers Music House*, 284 F. 815 (9th Cir. 1922); *In re Heilbroner*, 69 F.2d 643 (2nd Cir. 1934); *Henderson Tire & Rubber Co. v. Reeves*, 14 F.2d 903 (8th Cir. 1926), *cert. den.*, (1927) 273 U.S. 744, 71 L. Ed. 870, 47 S. Ct. 336 (1927); *Keaton v. Kennamer*, 42 F.2d 814 (10th Cir. 1930); *Mutual Life Ins. Co. v. Holly*, 135 F.2d 675 (7th Cir. 1943); *United States v. Hall*, 145 F2d 781 (9th Cir. 1944), *cert. den.*, 324 U.S. 871, 89 L. Ed. 1425, 65 S. Ct. 1016 (1945); *Petition of Henneman*, 137 F.2d 627 (1st Cir. 1943); *Crown Zellerbach Corp. v. Federal Trade Com.*, 156 F.2d 927 (9th Cir. 1964); *Green v. Occidental Petroleum Corp.*, 541 F.2d 1335 (9th Cir. 1976); *Ex parte Farrell*, 189 F.2d 540 (1st Cir. 1951), *cert. den.*, 342 U.S. 839, 96 L. Ed. 634, 72 S. Ct. 64 (1951).

Authority of federal courts under 28 U.S.C. § 1651 is not confined to issuance of writs in aid of jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected. *Application of President & Directors of Georgetown College, Inc.*, 331 F.2d 1000 (App. Dis. Col. 1964), *reh. den.*, 331 F.2d 1010 (App. Dis. Col. 1964), *cert. den.*, 377 U.S. 978, 12 L. Ed. 2d 746, 84 S. Ct. 1883 (1964).

Statutory power of this Court to issue writs of prohibition or mandamus could be constitutionally exercised only insofar as such writs are in aid of its appellate jurisdiction, and issuance of said writs in such cases usually would be refused unless question of public importance was involved. *United States Alkali Export Ass'n v. United States*, 325 U.S. 196, 89 L. Ed. 1554, 65 S. Ct. 1120 (1945). Also see *Ex parte Riddle*, 255 U.S. 450, 65 L. Ed. 725, 41 S. Ct. 370 (1921); *United States v. New York Tel. Co.*, 434 U.S. 159, 54 L. Ed. 2d 376, 98 S. Ct. 364 (1977); *In re Atlantic City Railroad*, 164 U.S. 633, 41 L. Ed. 579, 17 S. Ct. 208 (1897); *In re Garrosi*, 229 F. 363 (1st Cir. 1916); *Estate of Whitlock v. Commissioner*, 547 F.2d 506 (10th Cir. 1976), *cert. den.*, 430 U.S. 916, 51 L. Ed. 2d 594, 97 S. Ct. 1329 (1977); *In re Ojeda Rios*, (1988, CA2) 863 F.2d 202 (2nd Cir. 1988); *Aref v. United States*, 452 F3d 202 (2nd Cir. 2006); *Waddell v. Alldredge*, 480 F2d 1078 (3rd Cir. 1973); *First Jersey Secur., Inc. v. Bergen*, 605 F.2d 690 (3rd Cir. 1979), *cert. den.*, (1980) 444 U.S. 1074, 62 L. Ed. 2d 756, 100 S. Ct. 1020 (1980); *Baker Perkins, Inc. v. Werner & Pfleiderer Corp.*, 710 F.2d 1561 (Fed. Cir. 1983); *Ex parte Republic of Peru*, 318 U.S. 578, 87 L. Ed. 1014, 63 S. Ct. 793 (1943); *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095 (9th Cir. 1990); *United States Alkali Export Ass'n v. United States*, 325 U.S. 196, 89 L. Ed. 1554, 65 S. Ct. 1120 (1945); *Chandler v. Judicial Council of Tenth Circuit*, 398 U.S. 74, 26 L. Ed. 2d 100, 90 S. Ct. 1648 (1970), *reh. den.*, 399 U.S. 937, 26 L. Ed. 2d 809, 90 S. Ct. 2248 (1970); *Parr v. United States*, 351 U.S. 513, 100 L. Ed. 1377, 76 S. Ct. 912 (1956), *reh. den.*, 352 U.S. 859, 1 L. Ed. 2d 69, 77 S. Ct. 21 (1956); *United States v. Salinas*, 693 F.2d 348 (5th Cir. 1982).

Mandatory injunctions are appropriate where a party would be substantially prejudiced and suffer irreparable harm without extraordinary intervention by the court, or where failure to address unusual, exceptional and extraordinary circumstances would affect the appellate jurisdiction of the court. *New York v. Shore Realty Corp.*, 763 F.2d 49 (2nd Cir. 1985); *United States v. Sorren*, 605 F.2d 1211 (1st Cir. 1979); *In re Baldwin-United Corp. (Single Premium Deferred Annuities Ins. Litigation)*, 770 F.2d 328 (2nd Cir. 1985); *SEC v. Torr*, 87 F.2d 446 (2nd Cir. 1937); *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231 (3rd Cir. 1980), cert. den., 449 U.S. 1096, 66 L. Ed. 2d 824, 101 S. Ct. 893 (1981); *Westchester Day Sch. v. Village of Mamaroneck*, 386 F.3d 183 (2nd Cir. 2004).

Extraordinary remedial writs are only appropriate under unusual, exceptional, extraordinary, and compelling circumstances when no other remedy is available, and the petitioner bears a heavy burden of showing that extraordinary relief is necessary. *In re Cheney*, 334 F.3d 1096 (App. Dis. Col. 2003), *vacated, remanded*, 542 U.S. 367, 159 L. Ed. 2d 459, 124 S. Ct. 2576 (2004); *In re United States*, 397 F.3d 274 (5th Cir. 2005), *stay lifted, remanded*, 400 F.3d 277 (5th Cir. 2005), *cert. den.*, 161 L. Ed. 2d 289 (2005); *First Jersey Secur., Inc. v. Bergen*, 605 F.2d 690 (3rd Cir. 1979) *cert. den.*, 444 U.S. 1074, 62 L. Ed. 2d 756, 100 S. Ct. 1020 (1980); *Michigan Ass'n of Homes & Servs. for the Aging v. Shalala*, 127 F.3d 496 (6th Cir. 1997); *Illinois Council on Long Term Care, Inc. v. Shalala*, 143 F.3d 1072 (7th Cir. 1998); *Baker Perkins, Inc. v. Werner & Pfleiderer Corp.*, 710 F2d 1561 (Fed. Cir.

1983); *Cheney v. United States Dist. Court*, 542 U.S. 367, 159 L. Ed. 2d 459, 124 S. Ct. 2576 (2004); *United States v. Carter*, 270 F.2d 521 (9th Cir. 1959); *Lucas v. United States*, 36 F.2d 1015 (App. Dis. Col. 1929); *Fisher v. Delehant*, 250 F.2d 265 (8th Cir. 1957); *Hartley Pen Co. v. United States Dist. Court*, 287 F.2d 324 (9th Cir. 1961); *John Gund Brewing Co. v. United States*, 204 F. 17 (8th Cir. 1913), *mod.*, 206 F. 386 (8th Cir. 1913); *ITT Community Development Corp. v. Barton*, 569 F.2d 1351 (5th Cir. 1978); *International Business Machines Corp. v. United States*, 480 F.2d 293 (2nd Cir. 1973), *cert. den.*, 416 U.S. 979, 40 L. Ed. 2d 776, 94 S. Ct. 2413 (1974), *cert. den.*, 416 U.S. 980, 40 L. Ed. 2d 777, 94 S. Ct. 2413 (1974); *Ex parte Abernathy*, 320 U.S. 219, 88 L. Ed. 3, 64 S. Ct. 13 (1943).

Party seeking extraordinary relief must show that its right to relief is clear and indisputable. *In re Special March 1974 Grand Jury, etc.*, 541 F.2d 166 (7th Cir. 1976), *cert. den.*, 430 U.S. 929, 51 L. Ed. 2d 773, 97 S. Ct. 1547 (1977). A petitioner for extraordinary relief must present a question that is not moot, or has become moot. *Snauffer v. Stimson*, 155 F2d 861 (App. Dis. Col. 1946); *Boulder v. Lewis*, 21 F2d 910 (8th Cir. 1927); *Jackson v. Choate*, 404 F2d 910 (5th Cir. 1968). Extraordinary writs are appropriate to address judicial abuse of discretion in the courts below. *United States v. Mellon Bank, N. A.*, 545 F.2d 869 (3rd Cir. 1976); *In re Melvin*, 546 F.2d 1 (1st Cir. 1976); *Public Utilities Com. v. Capital Transit Co.*, 214 F.2d 242 (App. Dis. Col. 1954). The party seeking extraordinary relief must promptly and timely seek such relief, and any undue or unreasonable delay in seeking relief would make such relief inappropriate. *In re Eastern Cherokees*,

220 U.S. 83, 55 L. Ed. 379, 31 S. Ct. 373 (1911); *Cheney v. United States Dist. Court*, 542 U.S. 367, 159 L. Ed. 2d 459, 124 S. Ct. 2576 (2004); *United States v. Carter*, 270 F.2d 521 (9th Cir. 1959); *Lucas v. United States*, 36 F.2d 1015 (App. Dis. Col. 1929)

Destruction of evidence is an unusual, exceptional and extraordinary circumstance without any administrative remedy that warrants extraordinary intervention and injunctive relief by the court with jurisdiction. *In re Grand Jury Proceedings of United States*, 626 F.2d 1051 (1st Cir. 1980); *Chase v. Robson*, 435 F2d 1059 (7th Cir. 1970). Injunctions are appropriate to preserve status quo at any stage in the proceedings and prevent irreparable harm. See *Henderson Tire & Rubber Co. v. Reeves*, 14 F.2d 903 (8th Cir. 1926), *cert. den.*, 273 U.S. 744, 71 L. Ed. 870, 47 S. Ct. 336 (1927); *Harris v. Gibson*, 322 F.2d 780 (5th Cir. 1963), *cert. den.*, 376 U.S. 908, 11 L. Ed. 2d 606, 84 S. Ct. 661 (1964); *United States v. United States Dist. Court*, 206 F.2d 303 (9th Cir. 1953).

A petition for review by appeal can work in conjunction with other extraordinary remedial writs if appropriate. *Belbacha v. Bush*, 520 F.3d 452 (App. Dis. Col. 2008). Remedy by appeal from refusal of judge to remove himself for alleged disqualifications did not preclude remedy by mandamus or prohibition. *In re Lisman*, 89 F.2d 898 (2nd Cir. 1937). In light of exceptional and extraordinary circumstances, remedy by appeal was inadequate, and petitioner was entitled to some measure of relief under 28 U.S.C. § 1651 to prevent grave injustice. *Hartley Pen Co. v United States Dist. Court*, 287 F.2d 324, (9th Cir. 1961).

III. Factual Background

Prior to 1999, the North Carolina General Assembly, the legislative branch of the State Government, mandated that all constituent institutions of the University of North Carolina System ("UNC System") inspect all facilities and provide a comprehensive report (Pet. App. 46a). In December 1999, a comprehensive report published by Respondent found that more than fifty (50%) percent of the facilities owned, operated and maintained by Respondent and commonly known as North Carolina State University (hereinafter referred to as "NCSU", in reference to the campus, facilities, and the entire student, staff and faculty community as opposed to Respondent) failed to meet building and safety code standards (Pet. App. 46a-51a). Reports also found systematic facility deficiencies at multiple campuses in the UNC System, including North Carolina Central University ("NCCU") and the University of North Carolina at Pembroke ("UNCP") (Pet. App. 57a-66a). The reports also identified insufficient or inadequate heating, ventilation and air conditioning systems ("HVAC Systems"), and that numerous facilities required mitigation of asbestos and lead paint (Pet. App. 26a-88a). The reports further represented that various facilities and programs were "unsafe" and posed risks to student, staff and faculty health and safety (Pet. App. 26a-88a).

It is undisputed that Petitioner enrolled at Respondent NCSU as a full-time student from August 1999 until May 2004 (Pet. App. 17a). In August 2002, Petitioner was offered and accepted employment with Respondent NCSU as a Resident Advisor, with compensation in the form of a stipend

below minimum wage, housing and other monetary and physical services, such as parking and spending allowances for meals (Pet. App. 17a-18a). Petitioner resided in the housing provided through employment as a Resident Advisor in Wood Hall from August 2002 to May 2003, and again from August 2003 to September 2003, and in Metcalf Hall from May 2003 to August 2003 (Pet. App. 17a-18a; Record 32-175). Prior to this period of employment, Petitioner enlisted with the United States Naval Reserve for a contract period of eight (8) years in July 2002 (Pet. App. 17a-18a). Before enlisting, Petitioner was subject to a rigorous physical ability test, and an extensive physical exam, to determine if Petitioner was physically fit and medically qualified for military service, and the United States Navy Reserve determined that Petitioner was physically fit and medically qualified for military service prior to July 2002 (Pet. App. 17a-18a; Record 32-175).

In October 2001, Petitioner suffered a chronic acute respiratory infection and tonsillitis, which condition persisted for approximately one month, however, no cause for this condition was identified (Record 32-175). In August 2002, petitioner suffered a chronic acute respiratory infection, along with interim periods of flu-like, bronchitis-like, and pneumonia-like chest congestion, migraine headaches, vomiting, severe weight loss, and tonsillitis, among other conditions, which conditions persisted until October 2003 (Record 32-175). On October 7, 2002, Petitioner, along with maintenance staff of Respondent, identified chronic mold growth in the HVAC System in Wood Hall (Pet. App. 52a-54a). Maintenance staff represented, from experience, that the air filter in the HVAC System

unit in question appeared to be at least two (2) years old, though the air filters should have been changed at least every six (6) months (Pet. App. 52a-54a). This was documented in an administrative memorandum submitted to Respondent, which was included in the record (Pet. App. 52a-88a). Between May 2003 and August 2003, NCSU, as well as the rest of North Carolina, experienced unprecedented flooding, which floodwaters penetrated various NCSU facilities (Record 32-175). In August 2003, multiple facilities were closed at NCCU and UNCP for mold growth and other health hazards, threats and risks (Pet. App. 57a-66a). Student, staff and faculty at NCSU questioned the difference in responses at NCCU and UNCP as compared to NCSU (Record 32-175). Employees of Respondent, including Petitioner, were instructed not to say the word "mold" to any students moving into on-campus facilities or their parents (Record 32-175).

On September 17, 2003, an article was published in a NCSU student publication about mold and other health hazards in NCSU facilities (Record 64-65). On the same day Respondents Timothy Luckadoo and Gary Thompson exchanged e-mail correspondence amongst other officers and employees of Respondent (Pet. App. 80a-81a). Respondent Timothy Luckadoo represented to superiors that Respondent's maintenance of the HVAC Systems and other alleged hazards was appropriate and within the prescribed duty of care owed to student, staff and faculty (Pet. App. 80a). However, Respondent Gary Thomspon represented that the conditions described in the article were common considering the age of the HVAC Systems, and that it was common knowledge for facilities staff

that the HVAC Systems needed to be replaced and suggested discussing such replacement (Pet. App. 81a).

On the same day, Petitioner was verbally threatened by Respondent and resigned from his position of employment, and vacated the premises in question (Record 32-175). On September 24, 2003, Respondent sponsored a response to the initial article to correct any "misperceptions" or "incorrect information", without any reference to the observations or professional opinions of maintenance or facility staff (Record 64-68). Simultaneously, the State hired numerous third party and public servant experts to test the air quality and various surfaces throughout the facilities in question at NCCU and UNCP (Pet. App. 57a-66a). Emergency construction and renovation projects were commenced in all facilities at NCCU and UNCP deemed infested with mold and other health hazards, but no emergency action was taken at NCSU (Pet. App. 46a-88a).

Between September 2003 and December 2003, Petitioner, together with other student, staff and faculty at NCSU, authored a 145-page report as a rebuttal to Respondent's published response calling a "systematic" problem of health hazards a "misperception" (Record 32-175). This 145-page report was hand delivered by Petitioner to the Respondent Office of the Governor of the State of North Carolina (hereinafter referred to as the "Governor") on January 21, 2004 (Pet. App. 55a-56a). On January 23, 2004, the Respondent North Carolina Department of Health and Human Services, on behalf of the Respondent Governor, confirmed receipt and confirmed that the State would be initiating an investigation (Pet. App. 55a-56a).

At the same time, Respondent deceived and falsified information pertaining to this matter even to the authorities with executive oversight of occupational and health hazards. In a letter to the Respondent North Carolina Department of Labor, Respondent Tim Luckadoo represented that there were no systematic hazards, threats or risks to the health and safety of student, staff and faculty at NCSU, despite the representations of Respondent Gary Thompson, while specifically citing the administrative memorandum submitted by Petitioner to Respondent (Pet. App. 82a-83a). As a result, the North Carolina Department of Labor subsequently closed the case on this matter (Pet. App. 84a). At the same time, Respondent Timothy Blair represented that Wood Hall required renovation to ensure code compliance (Pet. App. 85a-88a)

Petitioner was honorably discharged from the United States Navy Reserve in June 2005 due to the acquisition of chronic respiratory conditions, primarily extrinsic asthma (Pet. App. 17a-18a). The early termination of this enlistment contract was caused by the medical disqualification of Petitioner for medical service and resulted in significant monetary damage to Petitioner (Pet. App. 17a-18a). During this interim period, Respondent never conducted the investigation called by the Governor to the same standards used in the investigations and inspections at NCCU and UNCP, such as air quality or toxicity test (Pet. App. 26a-88a).

IV. Procedural History

Pursuant to the North Carolina Tort Claims Act, N.C. Gen. Stat. § 143-291 et seq., Petitioner filed a certain affidavit of tort claim on December 30, 2005 (hereinafter the "Tort Claim") with the NORTH CAROLINA INDUSTRIAL COMMISSION (hereinafter referred to as the "Trial Court"), naming Respondent as committing negligence acts in the breach of Respondent's duty of care to Petitioner, which breach was the direct and proximate cause of injury to Petitioner (Record 2-5). The Trial Court is an executive administrative agency created by the North Carolina General Assembly pursuant to N.C. Gen. Stat. § 97-77, which is not part of the N.C. Courts, but is authorized to hear judicial claims as a trial court brought under the North Carolina Tort Claims Act and the N.C.W.C.A. by the power vested by the North Carolina General Assembly. See N.C. Const., art. I, § 6; N.C. Const. art. III, § 1; N.C. Const. art. III, § 11; N.C. Const., art. IV, § 1; N.C. Const. art. IV, § 3; N.C. Gen. Stat. § 7A-1 et seq.; N.C. Gen. Stat. § 143B-1 et seq.; *In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act*, 92 N.C. App. 1, 373 S.E.2d 572 (1988), rev'd on other grounds, 324 N.C. 373, 379 S.E.2d 30 (1989).

On March 9, 2006, Respondent timely filed an answer to the Tort Claim denying all guilt, and presenting three (3) affirmative defenses, which were N.C.W.C.A. exclusivity provisions based on Petitioner's employment with Respondent, statute of limitations, and contributory negligence, and simultaneously served Petitioner with a discovery request (Record 6-31). Petitioner responded to

Respondent's discovery request on May 1, 2006, and simultaneously served Respondent with a discovery request (Record 32-175). In said discovery request, Petitioner made reference to announced renovation of certain facilities owned, operated and maintained by Respondent which were identified as the direct and proximate cause of personal injury to Petitioner (Record 108-127). Petitioner also addressed all three (3) of Respondent's affirmative defenses by asserting, through sworn testimony and narrative responses, that (i) the personal injury of Petitioner was attributable to the negligence of Respondent during the time both before and after employment; the personal injury of Petitioner did not "arise" by "accident" "out of and in the course and scope of the employment"; and the personal injury of Petitioner was caused by the "intentional misconduct" of Respondent, which was defined as "misconduct substantially certain to cause serious injury or death" to Petitioner; (ii) the accrual of the personal injury of Petitioner occurred on June 9, 2005, even though Petitioner initiated a relationship with Respondent in August 1999, and Petitioner was diagnosed with the medical condition identified as the personal injury in question in November 2003, and (iii) Petitioner made every reasonable effort to meet or exceed his duty of care to himself, while at the same time Petitioner was deceived by Respondent, who provided misrepresentations as to the duty of care owed to Petitioner, and the hazards, threats and risks to Petitioners health, of which Respondent was aware (Record 108-127).

In an internal memorandum dated June 9, 2006, which Respondent provided to Petitioner through a public records requests, Respondent made

no mention of the affirmative defenses of statute of limitations or contributory negligence and counsel for Respondent questioned if the affirmative defense of N.C.W.C.A. exclusivity would be a "viable motion", but that it was being "considered" (Pet. App. 85a-86a). Respondent also began drafting a response to Petitioner's discovery request, which draft Respondent provided to Petitioner through public records requests, disclosing that Respondent intended to proceed with the renovations as scheduled during the proceedings, and that the renovations, announced by press release on January 31, 2006, after the filing of this claim, would provide substantial alteration of the heating, ventilation and air conditioning system ("HVAC System"), which was recommended by Petitioner and Respondent Gary Thomspon in 2003 (Pet. App. 87a-88a).

On July 20, 2006, Respondent filed a motion for summary judgment and motion to suspend discovery during the pendency of discovery exchange without providing a response to Petitioner's discovery request, in which Respondent abandoned the affirmative defenses of statute of limitations and contributory negligence and asserted the applicability of the N.C.W.C.A. and the exclusivity provisions thereof (Record 10-31). On August 11, 2006, Petitioner responded with a thorough response and a Cross-Motion to Compel Respondent to respond to Petitioner's discovery request, in which Petitioner provided Petitioner's entire discovery response, including exhibits, showing that there were genuine issues of triable issues as to the time, place, circumstance and nature of the personal injury in question (Record 32-175). Most relevant, Petitioner showed that (i) Respondent failed to show

that the injury in question "arose" by "accident" "out of and in the course and scope of the employment", (ii) Respondent was alleged to have committed "intentional misconduct" which was the direct and proximate cause of personal injury to Petitioner, (iii) the injury did not "arise" by "accident" "out of and in the course and scope of the employment", (iv) Petitioner was prejudiced by the suspension of discovery, and (v) there existed genuine issues of material fact and triable issues of fact as to all of the foregoing contentions (Record 32-175, 177-213). No significant or adequate findings of fact were made on the injury, and the Trial Court dismissed this Tort Claim with prejudice (Pet. App. 1a-25a).

Petitioner duly, timely and properly filed an appeal of right and petitions for extraordinary relief with the N.C. Court of Appeals asserting violation of constitutional rights to due process and equal protection under the law, pursuant to N.C. Gen. Stat. § 7A-29; N.C. Gen. Stat. § 7A-32 (Record 268-270). On October 30, 2007, Petitioner filed a Petition for Writ of Mandamus, Prohibition and Supersedeas, with an Incorporated Petition for an Immediate Change of Venue and New Trial with the N.C. Court of Appeals, seeking extraordinary relief given the renovation of the facilities in question and other misconduct by the Trial Court (Record 280). The N.C. Court of Appeals denied Petitioner's Petition by orders entered on November 14, 2007 (Pet. App. 14a-15a). On December 14, 2007, Petitioner duly, timely and properly filed the Record on Appeal with the N.C. Court of Appeals, which contained the questions for appellate review, which included questions challenging the actions of the Trial Court as a violation of the rights of Petitioner to equal

protection and due process of law under the Constitution of the State of North Carolina and the Constitution of the United States of America, primarily citing the provisions of the Fourteenth Amendment of the Constitution of the United States of America (Record 1-299). In pertinent part, these appellate questions contended that, after the course of due process where Petitioner and Respondent were afforded the opportunity to plead before the authorized administrative agency with statutory authority as a trial court, Petitioner was denied his right to due process in obtaining evidence relevant to these proceedings from the opposing party and incorrectly assigned a statutory classification without adequate evidence, in violation of the Fourteenth Amendment of the Constitution of the United States of America (Record 293-297). Petitioner duly, timely and properly filed a brief in support of appeal with the North Carolina Court of Appeals, which provided further legal and factual support for the questions for appellate review (Pet. App. 16a-22a). Respondent duly, timely and properly responded (Pet. App. 16a-22a). Petitioner moved the N.C. Court of Appeals to allow Petitioner to submit a reply brief, which motion was granted, due to the new questions Respondent raised in an attempt to disqualify evidence submitted by Petitioner (Pet. App. 16a-22a). The N.C. Court of Appeals allowed Petitioner's reply brief in which Petitioner asserted the summary judgment hearing provided all parties wih the opportunity to present any and all evidence in support of the assertions and defenses made at the hearing (Pet. App. 16a-22a).

On May 20, 2008, the Court of Appeals entered an order affirming the dismissal of this Tort Claim,

citing that the findings and conclusions of law are conclusive if supported by the competent evidence, and further finding that it was not necessary to address the remaining assignments of error presented by Petitioner (Pet. App. 16a-22a).

Petitioner duly, timely, and properly filed a Notice of Appeal of Right, Petition for Discretionary Review, and Petition for Writ of Supersedeas with the N.C. Supreme Court again asserting violation of constitutional right to due process, pursuant to N.C. Gen. Stat. § 7A-30; N.C. Gen. Stat. § 7A-31; N.C. Gen. Stat. § 7A-32 (Pet. App. 23a-25a). Respondent filed a Motion to Dismiss the Appeal in response (Pet. App. 23a-25a). Simultaneously upon filing and service of same, Petitioner submitted a formal request for public information and public records to the Government of the United States of America and the Government of the State of North Carolina in order to obtain documentation and evidence relevant to these proceedings to circumvent the suspension of discovery (Pet. App. 26a-88a). Between June 1, 2008 and August 20, 2008, Petitioner accumulated over 2,000 pages of documentation relevant to the factual questions of the nature of the injury, the condition of the facilities in question, which are owned, operated and maintained by Respondent, the alleged intentional misconduct of Respondent and the renovation of certain facilities in question, which are owned, operated and maintained by Respondent (Pet. App. 26a-88a). Despite this pending appeal during this correspondence exchange, Respondent referred to this Tort Claim as "failed". (Pet. App. 72a-73a). On August 22, 2008, Petitioner filed a Motion for Temporary Stay, Motion to Amend the Record on Appeal and Motion to Expedite the Appeal, together

with 481 pages of documentation obtained in response to the request for public information and public records (Pet. App. 26a-71a). This documentation, authored by Respondent, and authorized third party private experts, showed that Respondent had committed intentional misconduct, which was the direct and proximate cause of injury to Petitioner (Pet. App. 26a-71a). This documentation further showed that the Respondent was well aware that the hazards to which the Petitioner was exposed were recognized and known to be substantially certain to cause serious injury or death, and that the hazards were such that the general public was equally exposed (Pet. App. 26a-71a). N.C. Supreme Court granted Respondent's Motion to Dismiss the Appeal and denied all of the Petitioner's petitions contemporaneously on September 4, 2008 (Pet. App. 23a-25a). The North Carolina Supreme Court is the court of last resort in the State of North Carolina and is the court of original and supreme appellate jurisdiction. See N.C. Const. art. IV; N.C. Gen. Stat. § § 7A-25, 7A-26. The order of the North Carolina Supreme Court is final, and dismisses this matter in all respects (Pet. App. 23a-25a).

V. Relief Sought

The Petitioner seeks relief in order to mandate the Respondent provide an accounting of the evidence relevant to this matter and the preservation of the record in this matter, prohibit the Respondent from destroying any further evidence, and enjoin the Respondent by mandatory injunction for same.

JUSTIFICATION FOR GRANT OF THIS WRIT

I. This relief sought involved alleged due process violations under the appellate jurisdiction of this Court, and, appeal does not provide adequate relief for said violations, thus urgent and immediate extraordinary relief is required

Where this Court is presented with a question or a violation of due process rights due to a lower court's abuse of discretion, this Court reviews the entire record. *Sanders v. Shell Oil Co.*, 678 F.2d 614 (5th Cir. 1982); *Coughlin v. Lee*, 946 F.2d 1152 (5th Cir. 1991); *Trevino v. Celanese Corp.*, 701 F.2d 397 (5th Cir. 1983). In reviewing an order granting pre-trial judgment, evidence, as well as outstanding discovery, should be viewed in the light most favorable to the party that opposed the motion. *Eyre v. McDonough Power Equip., Inc.*, 755 F.2d 416, 419 (5th Cir. 1985); *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969).

Federal Rule of Civil Procedure 26(b) permits "discovery regarding any matter not privileged, which is relevant to the subject matter in the pending action" and discoverable information is not limited to admissible evidence, but includes anything "reasonably calculated to lead to the discovery of admissible evidence." *Hardy v. Chemetron Corp.*, 870 F.2d 1007 (5th Cir. 1989); *Dunbar v. United States*, 502 F.2d 506 (5th Cir. 1974). Similarly, the discovery rules of the North Carolina Rules of Civil Procedure guarantee that parties "may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or

defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter". N.C. Gen. Stat. § 1A-1, (N.C. R. Civ. P.) Rule 26 et seq.

Courts have traditionally construed "relevance" broadly, finding that information is relevant if it "encompass[es] any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 98 S. Ct. 2380, 57 L. Ed. 2d 253 (1978). Thus, although the lower courts are customarily accorded wide discretion in handling discovery matters, this Court will not uphold a ruling which has failed to adhere to the liberal spirit of the discovery principles or which results in fundamental unfairness at trial. *Burns v. Thiokol Chemical Corp.*, 483 F.2d 300 (5th Cir. 1973); *O'Neal v. Riceland Foods*, 684 F.2d 577 (8th Cir. 1982).

In light of the federal questions presented herein, it is clear that the N.C. Courts abused their discretion in this matter (Pet. App. 1a-88a). As demonstrated by the record, the pendency of this appeal has not served as an adequate stay of these proceedings (Pet. App. 1a-88a). The Respondent has plainly and unequivocally represented that facilities material to the instant action have been renovated by Respondent during the pendency of said action (Pet. App. 26a-88a). Further, the Respondent has not been held to account at any point in these proceedings to show good faith efforts to preserve any other documentary or physical evidence relevant

to the instant action, despite the pleadings of the Petitioner (Pet. App. 26a-88a, Record 1-299).

As discovery must provide the parties with access to any matter not privileged relevant to the subject matter jurisdiction of the pending action, denial or delay of access to circumstantial evidence that addresses any questions of subject matter jurisdiction is a substantial prejudice of fundamental due process rights. *Tanner v. McCall*, 625 F.2d 1183 (5th Cir. 1980).

In the instant case, despite the fact that the N.C. Courts did not adjudicate the objections presented by Petitioner, Petitioner had the burden of proving that the exclusivity provisions of the N.C.W.C.A. do not apply to bar this common law claim for civil remedy (Pet. App. 1a-88a). To substantiate these objections, the Petitioner was required to provide evidence of any intentional misconduct of the Respondent, equal risks of injury to the general public, and ineffectiveness of N.C.W.C.A. as an administrative remedy (Pet. App. 1a-88a).

As evidenced by the pleadings before the N.C. Courts, the N.C. Courts should have allowed for wide discovery to obtain the relevant circumstantial evidence (Pet. App. 26a-88a, Record 1-299). See *Burns, Trevino v. Celanese Corp.*, 701 F.2d 397 (5th Cir. 1983); *Weahkee v. Norton*, 621 F.2d 1080 (10th Cir. 1980); *Rich v. Martin Marietta Corp.*, 522 F.2d 333 (10th Cir. 1975); *Marshall v. Westinghouse Electric Corp.*, 576 F.2d 588 (5th Cir. 1978).

In the instant case, the N.C. Courts did not deny or overly restrict discovery sought by Petitioner, but heard this matter on the Respondent's Motion for Summary Judgment before

the Petitioner was provided his due process right to obtain evidence relevant to these proceedings from Respondent, most of which evidence is, or was, in the exclusive control of the Respondent (Pet. App. 1a-88a). It has already been shown that this evidence was extremely relevant and critical to the Petitioner's objections (Pet. App. 1a-88a). Furthermore, N.C. Courts took no action to preserve the record at any time during the pendency of this appeal (Pet. App. 1a-88a).

While the Respondent has various policies protecting certain records and documentation held by the Respondent, the N.C. Courts had to weigh the policies of Respondent and privilege and confidentiality of personal information against the need for the Petitioner to obtain evidence in litigation. See Fed. Rule of Evid. 501; N.C. Gen. Stat. § 1A-1, (N.C. R. Civ. P.) Rule 26 et seq.; *Brown v. Thompson*, 430 F.2d 1214 (5th Cir. 1970); *Kerr v. United States Dist. Ct. for Northern Dist.*, 511 F.2d 192 (9th Cir. 1975), *affirmed*, 426 U.S. 394, 96 S. Ct. 2119, 48 L. Ed. 2d 725 (1976); *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), *cert. denied*, 401 U.S. 974, 91 S. Ct. 1191, 28 L. Ed. 2d 323 (1971); *Swanner v. United States*, 406 F.2d 716 (5th Cir. 1969); *Association for Reduction of Violence v. Hall*, 734 F.2d 63 (1st Cir. 1984). As evidenced by the procedural history in this matter, most of the relevant documentation was not privileged, but public records (Pet. App. 26a-88a).

Given these facts, this Court has appellate jurisdiction since the automatic stay by appeal has not, and will not, provide adequate relief to ensure preservation of appellate jurisdiction (Pet. App. 1a-88a, Record 1-299).

II. The Petitioner has presented clear and convincing evidence that this matter involves an issue of public importance and appellate jurisdiction will be impaired without extraordinary relief

This Court has held that only the court having original jurisdiction in an action has the authority to hold a party in contempt for violation of an order or destruction of evidence, however, the destruction of evidence which is the subject of a matter pending on appeal threatens the preservation of appellate jurisdiction. *Merrimack River Sav. Bank v. Clay Center*, 219 U.S. 527; 31 S. Ct. 295; 55 L. Ed. 320 (1911).

Though the Respondent is accurate in arguing that the outcome of this appeal is only relevant to Petitioner, the adjudication of this matter on appeal is an issue of crucial public importance. The evidence clearly shows that the Respondent has acknowledged the public importance of the documentary and physical evidence in question in both this prayer for extraordinary relief and the Petitioner's simultaneous prayer for appellate review of this federal question. Respondent thoroughly inspected and reported on the conditions of every facility under the jurisdiction of the UNC System in December 1999, including the facilities maintained, owned and operated by Respondent at NCSU, and found that the facilities in question posed safety risks. Respondent closed numerous facilities owned, operated and maintained by Respondent in 2003 and simultaneously called for the initiation of a numerous investigations into this matter. Respondent declared a state of emergency and

modified standard protocol to remove standard jurisdiction of the UNC System over the facilities in question at NCCU and UNCP, and called for the assistance of NCDHHS, NCDOA and the federal government. Respondent ordered the temporary relocation of residential accommodations and educational programs to ensure the health and well being of student, staff and faculty at NCCU and UNCP, which conditions Petitioner has established by competent evidence posed identical threats, risks and hazards to Petitioner and others similarly situated at NCSU (Pet. App. 26a-88a).

As evidenced by the record through documentary and physical evidence created by Respondent, Respondent was negligent in the maintenance of said facilities, particularly in the maintenance of HVAC systems, and remediation of asbestos and lead paint. Respondent attempted to distort, misrepresent, and mislead the Petitioner, and others similarly situated, regarding the well documented and scientifically supported health hazards, risks and threats. Even though the Governor called an investigation into the specific facilities identified in the instant action, NCSU failed to conduct the investigation, and renovated Wood Hall during the pendency of the instant action (Pet. App. 26a-88a).

Moreover, any modification of due process through legislation must not violate constitutionally protected due process rights of any party.

In light of the foregoing, it is clear and convincing that this matter involves an issue of public importance, to both jurisprudence and public health, and that appellate jurisdiction will be impaired without immediate extraordinary relief.

III. As the Petitioner has exhausted all administrative remedies and no other remedy exists, this Court has an independent jurisdiction to review this matter on appeal and provide the extraordinary relief sought herein

As this action is not under the original or appellate jurisdiction of the United States District Court for the Eastern District of North Carolina, or the United States Court of Appeals for the Fourth Circuit, said courts cannot provide the extraordinary relief sought herein (Pet. App. 1a-25a). Petitioner has shown that Petitioner has exhausted all administrative remedies in the N.C. Courts, and has sought the extraordinary relief sought herein before all courts with original and appellate jurisdiction in the N.C. Courts, and has not received any relief to date (Pet. App. 1a-88a; Record 32-299).

It is well established that appellate jurisdiction on a federal question passed upon by a state court of last resort lies with this Court (Pet. App, 23a-25a; Record 293-297). It is within the independent jurisdiction of this Court to consider this matter and provide necessary relief (Pet. App. 23a-25a; Record 293-297).

In light of the foregoing, it is essential that the relief sought herein be granted in order to prevent further unjust prejudice against the Petitioner and to prevent further impairment of appellate jurisdiction.

CONCLUSION

In consideration of the foregoing, Petitioner shows it is in the interest of justice for this Court to provide the extraordinary relief sought herein.

This the 19th day of December 2008.

Respectfully submitted,

J. CHRISTOPHER BEY
C/O SHARON BEY-CHRISTOPHER,
ESQ., MANAGING ATTORNEY
LEGAL AID OF NORTH CAROLINA
208 Goldsboro Street, East
P.O. Box 2688
Wilson, NC 27894-2688
(252) 360-1982

Petitioner, Pro Se

APPENDIX

APPENDIX A

NORTH CAROLINA INDUSTRIAL COMMISSION

No. TA-19383

J. KAMAU CHRISTOPHER a/k/a
JOSEPH KAMAU CHRISTOPHER BEY,
PLAINTIFF

v.

NORTH CAROLINA STATE UNIVERSITY, ET AL.,
DEFENDANT

DECISION AND ORDER

BEFORE WANDA BLANCHE TAYLOR,
DEPUTY COMMISSIONER

BY WANDA BLANCHE TAYLOR,
DEPUTY COMMISSIONER

FILED FEBRUARY 9, 2007

Based on the forecast of evidence by the parties at the November 9, 2006 hearing, and the representations of the parties and evidence of record, the Undersigned makes the following

Findings of Fact

1. Plaintiff filed his Tort Claim Affidavit, Form T-1, on December 30, 2005, with the Industrial Commission alleging, in pertinent part, that during September through November 2003, he was an employee and Resident Advisor for Defendant, and allegedly was exposed to a "substandard and unhealthy indoor environment, primarily mold, in Wood Hall".

2. Defendant timely answered and moved to dismiss Plaintiff's tort claim on basis that it was barred by the North Carolina Workers' Compensation Act, and that Plaintiff's exclusive remedy was to file a Workers' Compensation claim.

3. Defendant also filed a motion for summary judgment, which was heard before the Undersigned in Raleigh on November 9, 2006.

4. Attached to Defendant's motion for summary judgment was a sworn Affidavit of Timothy S. Blair, Associate Director of University Housing for Defendant, with Exhibits.

5. The sworn statements made by Mr. Blair in his Affidavit are found to be credible and competent evidence in a summary judgment proceeding, along with the documents and exhibits attached to the

motion, and the same are incorporated into this Decision and Order by reference and made findings of fact as if set out fully herein.

6. Plaintiff was employed with Defendant as a Resident Advisor during the time period that Plaintiff allegedly was exposed to a mold; Plaintiff was compensated financially for residing in the residence hall where he allegedly was exposed to mold; and Plaintiff would not have resided in Wood Hall but for his employment status as a Resident Advisor with Defendant.

7. An employment relationship existed between Plaintiff and Defendant at the time Plaintiff was allegedly exposed to the allegedly "substandard and unhealthy indoor environment" set out in Plaintiff's Tort Claim Affidavit.

8. Plaintiff did not submit to the court any sworn Affidavits by witnesses, or any other competent evidence during the summary judgment hearing, to rebut Defendant's contention that Plaintiff was an employee of Defendant at all relevant times.

Based on the foregoing Findings of Fact, the Undersigned makes the following

Conclusions of Law

1. Summary Judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, who that there is no genuine issue as to any material fact and that any party is entitled to a

judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c). In making this determination, "the evidence presented by the parties must be viewed in the light most favorable to the non-movant." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998).

2. The party moving for summary judgment has the burden of establishing the absence of any triable issue of fact, which may be satisfied by showing that the party cannot overcome an affirmative defense which would bar the claim. *Taylor v. Ashburn*, 112 N.C. App. 604, 606-607, 436 S.E.2d 276, 278 (1993), *cert. denied*, 336 N.C. 77, 445 S.E.2d 46 (1994).

3. The moving party meets this burden if it can show that an essential element of the nonmoving party's claim does not exist, or that the nonmoving party cannot produce evidence of an essential element of his claim, or cannot overcome an affirmative defense which would bar the claim. Once the party moving for summary judgment meets its burden, it is the nonmoving party's burden to produce a forecast of evidence showing that it will be able to establish at least a prima facie case at trial. *Forsyth Mem. Hosp. v. Armstrong World Indus., Inc.*, 122 N.C. App. 413, 470 S.E.2d 826 (1996).

4. Under the Tort Claims Act, the State has expressly waived its sovereign immunity in certain circumstances. N.C. Gen. Stat. §§ 143-291, 143-297. This waiver of immunity shall be strictly construed. *Floyd v. N.C. State Highway Comm'n*,, 241 N.C. 461, 464, 85 S.E.2d 703, 705 (1955). The Industrial Commission has jurisdiction under N.C. Gen. Stat. §

143-291, et seq., to hear tort claims arising as a result of the alleged negligence of an officer, employee, involuntary servant, or agent of the State while acting within the scope of his employment or agency, or authority under circumstances where the State, if a private person, would be liable to the Plaintiff under state laws. *Guthrie v. North Carolina State Ports Auth.*, 307 N.C. 522, 299 S.E.2d 618 (1983).

5. The question of whether an employer-employee relationship exists is jurisdictional. *Askew v. Leonard Tire Co.*, 264 N.C. 168, 141 S.E.2d 280 (1965). "An employee is one who works for another for wages or salary, and the right to demand pay for his services from his employer would seem to be essential to his right to receive compensation under the act." *Lucas v. Li'l Gen. Stores*, 289 N.C. 212, 221 S.E.2d 257 (1976). "When an inmate is injured while working at his prison job, his exclusive remedy for any injury is a workers' compensation claim . . . ." *Vereen v. N.C. Dep't of Corr.*, 168 N.C. App. 588, 608 S.E.2d 412 (2005).

6. In claims by employees involving injuries by accident arising out of and in the course of employment, and occupational illnesses allegedly contracted through employment, a plaintiff's exclusive remedy is to file a claim under the North Carolina Workers' Compensation Act. N.C. Gen. Stat. § 97-10.1 (2006); See also *Ryles v. Durham Co. Hosp. Corp.*, 107 N.C. App. 455, 420 S.E.2d 487, *cert. denied*, 333 N.C. 169, 424 S.E.2d 406 (1992) (holding that college respiratory therapist student was

limited to Workers Compensation remedy in slip and fall at college).

7. Defendant has met its burden of proof by forecasting sufficient, competent evidence to show that Plaintiff was an employee of Defendant at the time he was allegedly exposed to a "harmful" indoor environment, which in turn allegedly caused him to sustain a respiratory illness.

8. Plaintiff has failed to forecast sufficient, competent evidence to show that the Industrial Commission has subject-matter jurisdiction to hear Plaintiff's claim under the Tort Claims Act. Plaintiff has further failed to show there is a genuine issue as to a material fact.

9. Though the Undersigned makes no determination as to the merits of Plaintiff's claim, Plaintiff's exclusive remedy is to seek recourse under the North Carolina Workers' Compensation Act.

10. Plaintiff's Tort Claim should be dismissed with prejudice.

Based on the foregoing Findings of Fact and Conclusions of Law, the Undersigned makes the following . . . Decision and Order: . . . 1. Plaintiff's Tort Claim is dismissed with prejudice. . . . 2. Plaintiff shall pay the costs of this matter. . . . 3. This Tort Claim is taken off of the active docket.

/s/ WANDA BLANCHE TAYLOR

APPENDIX B

NORTH CAROLINA INDUSTRIAL COMMISSION

No. TA-19383

J. KAMAU CHRISTOPHER a/k/a
JOSEPH KAMAU CHRISTOPHER BEY,
PLAINTIFF

v.

NORTH CAROLINA STATE UNIVERSITY, ET AL.,
DEFENDANT

DECISION AND ORDER

BEFORE THE FULL COMMISSION REVIEW PANEL, CHRISTOPHER SCOTT, PANEL CHAIRMAN AND COMMISSIONER, BUCK LATTIMORE, CHAIR AND COMMISSIONER, AND DIANNE C. SELLERS, COMMISSIONER

BY CHRISTOPHER SCOTT, COMMISSIONER

FILED AUGUST 10, 2007

Based upon all of the competent evidence of record and reasonable inferences flowing therefrom, the Full Commission makes the following

Findings of Fact

1. The Plaintiff filed his Tort Claim Affidavit, Form T-1, on December 30, 2005, with the Industrial Commission alleging, in pertinent part, that during September through November 2003, he was an employee and Resident Advisor for Defendant, and allegedly was exposed to a "substandard and unhealthy indoor environment, primarily mold, in Wood Hall".

2. The Defendant timely answered and moved to dismiss Plaintiff's tort claim on basis that it was barred by the North Carolina Workers' Compensation Act, and that Plaintiff's exclusive remedy was to file a Workers' Compensation claim.

3. The Defendant also filed a motion for summary judgment, which was heard before the [North Carolina Industrial Commission] on November 9, 2006.

4. Attached to Defendant's motion for summary judgment was a sworn Affidavit of Timothy S. Blair, Associate Director of University Housing for Defendant, with Exhibits. The sworn statements made by Mr. Blair in his Affidavit are found to be credible and competent evidence in a summary judgment proceeding.

5. Based upon the evidence of record, the Full Commission finds that the Plaintiff was employed with the Defendant as a Resident Advisor during the time period that the Plaintiff allegedly was exposed to a mold. The Full Commission further finds that the Plaintiff was compensated financially for residing in the residence hall where he allegedly was exposed to mold. Moreover, the Plaintiff would not have resided in Wood Hall but for his employment status as a Resident Advisor with Defendant.

6. The Full Commission finds that an employment relationship existed between the Plaintiff and the Defendant at the time Plaintiff was allegedly exposed to the allegedly "substandard and unhealthy indoor environment" set out in Plaintiff's Tort Claim Affidavit.

7. The Full Commission finds that the Plaintiff has not provided sufficient evidence to rebut the Defendant's contention that the Plaintiff was an employee of the Defendant at all relevant times.

Based on the foregoing Findings of Fact, the Full Commission reaches the following

Conclusions of Law

1. Summary Judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, who that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c). In making this determination, "the

evidence presented by the parties must be viewed in the light most favorable to the non-movant." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998).

2. The party moving for summary judgment has the burden of establishing the absence of any triable issue of fact, which may be satisfied by showing that the party cannot overcome an affirmative defense which would bar the claim. *Taylor v. Ashburn*, 112 N.C. App. 604, 606-607, 436 S.E.2d 276, 278 (1993), cert. denied, 336 N.C. 77, 445 S.E.2d 46 (1994). The moving party meets this burden if it can show that an essential element of the nonmoving party's claim does not exist, or that the nonmoving party cannot produce evidence of an essential element of his claim, or cannot overcome an affirmative defense which would bar the claim. Id. The defendant has met its burden of proof by forecasting sufficient, competent evidence to show that the plaintiff was an employee of the defendant at the time he was allegedly exposed to a "harmful" indoor environment, which in turn allegedly caused him to sustain a respiratory illness. Id.

3. Once the party moving for summary judgment meets its burden, it is the nonmoving party's burden to produce a forecast of evidence showing that it will be able to establish at least a prima facie case at trial. *Forsyth Mem. Hosp. v. Armstrong World Indus., Inc.*, 122 N.C. App. 413, 470 S.E.2d 826 (1996). The plaintiff has failed to forecast sufficient, competent evidence to rebut the defendant's evidence, and has failed to show that the Plaintiff

was not an employee of the defendant at the time of the alleged exposure. Id.

4. Under the Tort Claims Act, the State has expressly waived its sovereign immunity in certain circumstances. N.C. Gen. Stat. §§ 143-291, 143-297. This waiver of immunity shall be strictly construed. *Floyd v. N.C. State Highway Comm'n*, 241 N.C. 461, 464, 85 S.E.2d 703, 705 (1955). The Industrial Commission has jurisdiction under N.C. Gen. Stat. § 143-291, et seq., to hear tort claims arising as a result of the alleged negligence of an officer, employee, involuntary servant, or agent of the State while acting within the scope of his employment or agency, or authority under circumstances where the State, if a private person, would be liable to the Plaintiff under state laws. *Guthrie v. North Carolina State Ports Auth.*, 307 N.C. 522, 299 S.E.2d 618 (1983). The plaintiff has failed to forecast sufficient, competent evidence to show that the Industrial Commission has subject-matter jurisdiction to hear the plaintiff's claim under the Tort Claims Act. Id. The plaintiff has further failed to show there is a genuine issue as to a material fact. N.C. Gen. Stat. § 1A-1, Rule 56(c).

5. The question of whether an employer-employee relationship exists is jurisdictional. *Askew v. Leonard Tire Co.*, 264 N.C. 168, 141 S.E.2d 280 (1965). "An employee is one who works for another for wages or salary, and the right to demand pay for his services from his employer would seem to be essential to his right to receive compensation under the act." *Lucas v. Li'l Gen. Stores*, 289 N.C. 212, 221 S.E.2d 257 (1976).

6. In claims by employees involving injuries by accident arising out of and in the course of employment, and occupational illnesses allegedly contracted through employment, a plaintiff's exclusive remedy is to file a claim under the North Carolina Workers' Compensation Act. N.C. Gen. Stat. § 97-10.1 (2006); See also *Ryles v. Durham Co. Hosp. Corp.*, 107 N.C. App. 455, 420 S.E.2d 487, *cert. denied*, 333 N.C. 169, 424 S.E.2d 406 (1992) (holding that college respiratory therapist student was limited to Workers' Compensation remedy in slip and fall at college).

7. Based on the competent evidence of record, the Full Commission concludes that the plaintiff's present tort claim should be dismissed with prejudice. N.C. Gen. Stat. § 143-291 et seq. Though the Full Commission makes no determination as to the merits of the Plaintiff's claim, the Full Commission concludes that the Plaintiff's exclusive remedy is to seek recourse under the North Carolina Workers' Compensation Act. N.C. Gen. Stat. § 97-1 et seq. The Plaintiff shall be granted leave to duly file a workers' compensation claim pursuant to the Workers' Compensation Act within one year of the entry of this Order. Id.

8. Plaintiff's Tort Claim should be dismissed with prejudice.

Based on the foregoing Findings of Fact and Conclusions of Law, the Full Commission enters the following

Order:

1. The Plaintiff's Tort Claim must be, and is hereby, dismissed with prejudice.

2. The Plaintiff is hereby granted leave to duly file a workers' compensation claim with the Industrial Commission pursuant to the N.C. Workers' Compensation Act within one year of the entry of this Order.

3. Plaintiff shall pay the costs of this matter.

This the 23rd day of July 2007.

/s/ CHRISTOPHER SCOTT

CONCURRING:

/s/ BUCK LATTIMORE

/s/ DIANNE C. SELLERS

APPENDIX C

COURT OF APPEALS OF NORTH CAROLINA
GENERAL COURT OF JUSTICE OF
NORTH CAROLINA

No. COA P07-907

J. KAMAU CHRISTOPHER a/k/a
JOSEPH KAMAU CHRISTOPHER BEY,
PLAINTIFF-APPELLANT-PETITIONER

v.

NORTH CAROLINA STATE UNIVERSITY, ET AL.,
DEFENDANT-APPELLEE-RESPONDENT

ORDERS

BEFORE THE
COURT OF APPEALS OF NORTH CAROLINA

FILED NOVEMBER 14, 2007

The petition filed in this cause on the 30th day of October 2007 and designated "Petition for Writ of Mandamus" is denied.

The petition filed in this cause on the 30th day of October 2007 and designated "Petition for Prohibition" is denied.

The petition filed in this cause on the 30th day of October 2007 and designated "Petition for Writ of Supersedeas" is denied.

By order of the Court this the 14th day of November 2007.

[Orders certified by]

/s/ JOHN H. CONNELL
CLERK OF [COURT] . . .
NORTH CAROLINA COURT OF APPEALS

APPENDIX D

COURT OF APPEALS OF NORTH CAROLINA
GENERAL COURT OF JUSTICE OF
NORTH CAROLINA

No. COA 07-1516

J. KAMAU CHRISTOPHER a/k/a
JOSEPH KAMAU CHRISTOPHER BEY,
PLAINTIFF-APPELLANT

v.

NORTH CAROLINA STATE UNIVERSITY, ET AL.,
DEFENDANT-APPELLEE

OPINION

BEFORE
TYSON, MCCULLOUGH and STROUD, Judges

BY TYSON, Judge

FILED MAY 20, 2008

Appeal by plaintiff from decision and order entered 10 August 2007 by Commissioner Christopher Scott for the North Carolina Industrial Commission.

Heard in the Court of Appeals 1 May 2008. [Appearances are] Joseph Kamau Christopher Bey, pro se, for plaintiff-appellant [and] Attorney General Roy Cooper, by Assistant Attorney General Dahr Joseph Tanoury, for the defendant-appellee.

J. Kamau Christopher ("plaintiff") appeals from the Full Commission of the North Carolina Industrial Commission's ("the Commission") order dismissing his tort claim action against North Carolina State University ("defendant"). We affirm.

I. Background

Plaintiff was enrolled as a student at North Carolina State University from August 1999 to May 2004. In July 2002, plaintiff enlisted in the U.S. Naval Reserve and attained the status of serving as an Active Duty member in the Nuclear Propulsion Officer Candidate Program. Plaintiff's initial enlistment physical revealed he was "fit for full service." In August 2002, plaintiff was hired as a Resident Advisor for Wood Residence Hall ("Wood Hall") for the 2002-2003 term. Plaintiff was subsequently rehired as Resident Advisor for the following 2003-2004 term. On 18 September 2003, plaintiff resigned from his position due to "mold and mildew growing in visible areas in the living space of residents [sic] and a lack of responsiveness from the University Administration[.]" In November 2003, plaintiff was diagnosed with a permanent asthmatic and respiratory condition. Despite these medical

conditions, plaintiff was granted a waiver by the Navy Recruiting Command. After graduation, plaintiff was transferred to the Naval Air Station in Pensacola, Florida. Upon plaintiff's arrival, a commissioning physical was conducted, plaintiff's medical waiver was revoked, and further analysis of plaintiff's medical condition and fitness to serve was ordered.

Such analysis revealed plaintiff's respiratory condition had further pr gressed. On 5 May 2005, the Navy Medical Command Physical Evaluation Board issued an order finding plaintiff had acquired a medical condition, asthma, which was a physically disqualifying factor. Plaintiff was released from his military obligation with an honorable discharge, which terminated his commitment five years early.

On 30 December 2005, plaintiff filed an affidavit under the Tort Claims Act alleging he was damaged in the amount of $150,000.00 from "exposure to substandard and unhealthy indoor environment" while he was employed as a Resident Advisor in Wood Hall. On 9 March 2006, defendant filed a motion to dismiss and answer. Defendant asserted plaintiff alleged he was injured while employed with defendant and therefore his exclusive remedy was to assert a claim under the North Carolina Workers' Compensation Act.

On 20 July 2006, defendant filed a motion for summary judgment. Plaintiff filed a response to defendant's motion for summary judgment and asserted plaintiff's injury "did not arise out of and in the course of employment, nor is the injury compensable under the North Carolina Workers' Compensation Act, and thus the Plaintiff . . . can only seek compensation for damages under the Tort

Claims Act as filed." On 9 February 2007, Deputy Commissioner Wanda Taylor filed an order dismissing plaintiff's tort claim with prejudice and entered the following conclusions:

> 7. Defendant has met its burden of proof by forecasting sufficient, competent evidence to show that Plaintiff was an employee of Defendant at the time he was allegedly exposed to a "harmful" indoor environment, which in turn allegedly caused him to sustain a respiratory illness.
>
> 8. Plaintiff has failed to forecast sufficient, competent evidence to rebut Defendant's evidence, and has failed to show that Plaintiff was not an employee of Defendant at the time of the alleged exposure.
>
> 9. Plaintiff has failed to forecast sufficient, competent evidence to show that the Industrial Commission has subject-matter jurisdiction to hear Plaintiff's claim under the Tort Claims Act. Plaintiff has further failed to show there is a genuine issue as to a material fact.

On 10 August 2007, the Full Commission affirmed the Deputy Commissioner's order and dismissed plaintiff's tort claim with prejudice. Plaintiff appeals.

II. Issues

Plaintiff argues the Industrial Commission erred by: (1) failing to make findings of fact concerning all crucial issues, including the alleged injury; (2) hearing defendant's motion for summary judgment and finding no genuine issues of material fact exist; and (3) dismissing plaintiff's tort claim based upon the assertion that a claim under the North Carolina Workers' Compensation Act was plaintiff's exclusive remedy.

III. Standard of Review

[W]hen reviewing Industrial Commission decisions, appellate courts must examine whether any competent evidence supports the Commission's findings of fact and whether those findings . . . support the Commission's conclusions of law. The Commission's findings of fact are conclusive on appeal when supported by such competent evidence, even though there is evidence that would support findings to the contrary. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 700 (2004) (internal quotations omitted). However, our Supreme Court has repeatedly held "that jurisdictional facts found by the Industrial Commission, even when supported by competent evidence, are not binding upon the courts on appeal, and that the reviewing court has the duty to make its own independent findings." *Lemmerman v. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 86 (1986) (citations omitted).

IV. Subject Matter Jurisdiction

The dispositive issue before us is whether the North Carolina Workers' Compensation Act provides plaintiff his exclusive remedy for his alleged injury and divests the Industrial Commission of subject matter jurisdiction to adjudicate plaintiff's tort claim.

The determinative factor that subjects the parties to the provisions of the North Carolina Workers' Compensation Act is whether an employee-employer relationship exists. *Cox v. Transportation Co.*, 259 N.C. 38, 42, 129 S.E.2d 589, 592 (1963); see also *Askew v. Tire Co.*, 264 N.C. 168, 170, 141 S.E.2d 280, 282 (1965) ("The question whether the employer-employee relationship exists is clearly jurisdictional.").

Here, plaintiff conceded numerous times in his pleadings and before the Industrial Commission that he was an employee of defendant while he attended classes during the 2002-2003 school term and briefly for the 2003-2004 term. Plaintiff specifically states in his Response to Defendant's Motion for Summary Judgment, "Plaintiff admits and acknowledges that his relationship with the Defendant included a employer-employee arrangement, as defined by the Statutes, and thus he was employed with the Defendant during a period in which the alleged injury manifested itself[] . . . ."

It is well settled in this jurisdiction that the North Carolina Workers' Compensation Act is the exclusive remedy when an employee is injured by accident arising out of and in the course and scope of employment. *Wood v. Guilford Cty.*, 355 N.C. 161, 164, 558 S.E.2d 490, 493 (2002) (citing N.C. Gen. Stat. § 97-10.1).

Because the North Carolina Workers' Compensation Act is plaintiff's exclusive remedy for the alleged injury that occurred during his employment, the Industrial Commission properly dismissed plaintiff's tort claim with prejudice. This assignment of error is overruled. In light of our holding, it is unnecessary to address plaintiff's remaining assignments of error.

V. Conclusion

The North Carolina Workers' Compensation Act provides plaintiff's exclusive remedy for his alleged injury that arose out of and in the course and scope of employment. The Industrial Commission's order dismissing plaintiff's tort claim with prejudice is affirmed.

Affirmed.

Judges MCCULLOUGH and STROUD concur.

APPENDIX E

SUPREME COURT OF NORTH CAROLINA
GENERAL COURT OF JUSTICE OF
NORTH CAROLINA

No. 246-P07

J. KAMAU CHRISTOPHER a/k/a
JOSEPH KAMAU CHRISTOPHER BEY,
PLAINTIFF-APPELLANT-PETITIONER

v.

NORTH CAROLINA STATE UNIVERSITY, ET AL.,
DEFENDANT-APPELLEE-RESPONDENT

ORDERS

BEFORE
SUPREME COURT OF NORTH CAROLINA

BY HUDSON, JUDGE

FILED SEPTEMBER 4, 2008

Upon consideration of the notice of appeal from the North Carolina Court of Appeals, filed by the Plaintiff on the 30th day of May 2008 in this matter pursuant to G.S. 7A-30, and the motion to dismiss the appeal for lack of substantial constitutional question filed by the Defendant, the following order was entered and is hereby certified to the North Carolina Court of Appeals: the motion to dismiss the appeal is "Allowed by order of the Court in conference, this the 26th day of August 2008. /s/ Hudson, J.; [f]or the Court."

Upon consideration of the petition filed on the 30th day of May 2008 by Plaintiff in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals: "Denied by order of the Court in conference, this the 26th day of August 2008. /s/ Hudson, J.; [f]or the Court."

Upon consideration of the petition filed by Plaintiff on the 30th day of May 2008 for Writ of Supersedeas of the judgment of the Court of Appeals, the following order was entered and is hereby certified to the North Carolina Court of Appeals: "Denied by order of the Court in conference, this the 26th day of August 2008. /s/ Hudson, J.; [f]or the Court."

The following order has been entered on the motion filed on the 22nd day of August 2008 by Plaintiff for Temporary Stay: "Motion Denied by order of the Court in conference this the 26th day of August 2008. /s/ Hudson, J.; [f]or the Court."

The following order has been entered on the motion filed on the 22nd day of August 2008 by Plaintiff to Amend the Record on Appeal: "Motion Denied by order of the Court in conference this the 26th day of August 2008. /s/ Hudson, J.; [f]or the Court."

The following order has been entered on the motion filed on the 22nd day of August 2008 by Plaintiff to Expedite Appeal: "Motion Denied by order of the Court in conference this the 26th day of August 2008. /s/ Hudson, J.; [f]or the Court."

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 4th day of September 2008.

Christie Speir Cameron
Clerk, Supreme Court of North Carolina
/s/ SHAULA A. BRANNAN
Assistant Clerk

APPENDIX F

SUPREME COURT OF NORTH CAROLINA
GENERAL COURT OF JUSTICE OF
NORTH CAROLINA

No. 246-P07

J. KAMAU CHRISTOPHER a/k/a
JOSEPH KAMAU CHRISTOPHER BEY,
PLAINTIFF-APPELLANT-PETITIONER

v.

NORTH CAROLINA STATE UNIVERSITY, ET AL.,
DEFENDANT-APPELLEE-RESPONDENT

PLAINTIFF-APPELLANT-PETITIONER'S
MOTION FOR TEMPORARY STAY,
MOTION TO AMEND THE RECORD, AND
MOTION TO EXPEDITE THIS APPEAL

APPEAL FROM
NORTH CAROLINA INDUSTRIAL COMMISSION,
NO. TA-19383

FILED AUGUST 22, 2008

PETITION AND MOTION FOR TEMPORARY STAY

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

NOW COMES the Plaintiff-Appellant, JOSEPH KAMAU CHRISTOPHER BEY (hereinafter the "Plaintiff"), pursuant to Rules 8, 23 and 37 of the North Carolina Rules of Appellate Procedure, and hereby respectfully requests, petitions, and moves the Honorable Supreme Court of North Carolina to grant the Plaintiff an order for temporary stay. The Plaintiff makes this Motion for Temporary Stay on grounds that evidence was recently obtained showing that the Defendant-Appellee, NORTH CAROLINA STATE UNIVERSITY (hereinafter the "Defendant"), has destroyed evidence relevant to these proceedings, and may destroy additional evidence relevant to these proceedings in the future. The Plaintiff shows that this Supreme Court is the proper venue for this Motion and that the Plaintiff's Petition for Writ of Supersedeas is currently pending before this Supreme Court. As this Motion for Temporary Stay is filed and served by separate paper, the Plaintiff shows that this Motion is filed and served in the same manner as a Petition for Writ of Supersedeas. To further show good cause in support of this motion, the Plaintiff shows that the dismissal of this claim before the North Carolina Industrial Commission without a ruling upon the Plaintiff's Motion to Compel the Defendant to Respond to the Plaintiff's Discovery Request makes it impracticable to seek a stay in any other manner. Further, the order granting the Defendant's Motion to Suspend

Discovery, pending judgment on the Defendant's Motion for Summary Judgment, was dissolved at the time of the dismissal, leaving this matter without controlling judicial judgment. This Motion for Temporary Stay is further supported by the following incorporated Memorandum of Law.

MOTION TO AMEND THE RECORD ON APPEAL

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

In addition, the Plaintiff, pursuant to Rules 9 and 37 of the North Carolina Rules of Appellate Procedure, hereby respectfully requests, petitions and moves the Supreme Court of North Carolina to grant an order allowing the Plaintiff to amend the Record on Appeal in this matter. In support of this Motion, Plaintiff shows unto the North Carolina Supreme Court that the portions of the trial court record that were not relevant in these appellate proceedings at the time of the notice of appeal to the North Carolina Court of Appeals is now relevant due to the evidence obtained revealing questionable conduct of the Defendant in this matter. This Motion to Amend the Record on Appeal is further supported by the following incorporated Memorandum of Law.

MOTION TO EXPEDITE THIS APPEAL

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

The Plaintiff, pursuant to Rules 37 of the North Carolina Rules of Appellate Procedure, hereby

respectfully requests, petitions and moves the Supreme Court of North Carolina to expedite all matters relating to this appeal. In support of this petition, the Plaintiff shows that the Plaintiff has suffered immediate and irreparable harm which prejudices the rights of the Plaintiff in this matter before the Plaintiff could duly be heard in opposition, and the appeal bond submitted herewith is not adequate security to prevent further prejudice and any additional immediate and irreparable harm. To show good cause in support of this Motion, the Plaintiff shows that a Notice of Appeal of Right, Petition for Discretionary Review, and Petition for Writ of Supersedeas are before the North Carolina Supreme Court, however, the Plaintiff has obtained evidence that the Defendant has destroyed evidence relevant to this matter in the midst of a suspension of discovery. This Motion to Expedite this Appeal is further supported by the following incorporated Memorandum of Law.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF-APPELLANT'S PETITION AND MOTION FOR TEMPORARY STAY, MOTION TO AMEND THE RECORD ON APPEAL, AND MOTION TO EXPEDITE THIS APPEAL

STATEMENT OF THE CASE

Whereas this Motion for Temporary Stay is submitted pursuant to Rule 23 of the North Carolina Rules of Appellate Procedure, and whereas the Plaintiff's Notice of Appeal, Petition for Discretionary Review, and Petition for Writ of Supersedeas, filed and served 29 May 2008, is currently pending before

this Supreme Court (hereinafter the "Plaintiff's Notice of Appeal"), the Statement of the Case and the Statement of the Facts in the Plaintiff's Notice of Appeal is incorporated herein by reference. Reference is also made to the Defendant's Response to the Plaintiff's Notice of Appeal and the Defendant's Motion to Dismiss the Plaintiff's Appeal, filed and served 11 June 2008 (hereinafter the "Defendant's Motion to Dismiss").

Simultaneously upon the filing and service of the Plaintiff's Notice of Appeal on 29 May 2008, the Plaintiff duly served public information requests, pursuant to the Public Records Law, Chapter 132 of the North Carolina General Statutes (hereinafter the "Public Information Requests"), upon the Defendant, the Governor of the State of North Carolina (hereinafter the "Governor"), the North Carolina Department of Health and Human Services (hereinafter "NCDHHS"), the North Carolina Department of Administration (hereinafter "NCDOA"), and the University of North Carolina System General Administration (hereinafter the "UNC System"), the North Carolina Department of Labor (hereinafter "NCDOL"), the North Carolina Department of Insurance (hereinafter "NCDOI"), and the North Carolina Department of Cultural Resources (hereinafter "NCDOCR"), among other public agencies in the Government of the State of North Carolina (hereinafter collectively referred to as the "State Government"). In response to this Public Information Request, the State Government has confirmed that the Defendant destroyed evidence relevant to these proceedings.

STATEMENT OF THE FACTS

Notwithstanding that which is incorporated herein by reference, following the filing of this claim with the North Carolina Industrial Commission, the Defendant announced the renovation of a certain facility designated as Building Number 112 at North Carolina State University (hereinafter the "University", when referring to facilities, the campus, and the community of student, staff and faculty, excluding liable principals, agents and officers of the State Government), also known as Wood Hall (hereinafter "Wood Hall"), on 31 January 2006 (See Plaintiff's Notice of Appeal) (R pp. 32-61, 108-127). Throughout these proceedings, both before the North Carolina Industrial Commission and the North Carolina Court of Appeals, the Plaintiff moved for intervention and injunctive relief, citing the scheduled renovation and the suspension of discovery as a potential obstruction of justice, destruction of evidence and substantial prejudice, violation and disenfranchisement of the rights of the Plaintiff in this matter (See Plaintiff's Notice of Appeal) (R pp. 32-61, 108-127, 220-223, 227-250, 262-269, 280, 283-285). Both the North Carolina Industrial Commission and the Court of Appeals ignored or denied all of the motions submitted by the Plaintiff for relief (See Plaintiff's Notice of Appeal, and *Christopher v. N.C. State Univ.*, No. COA07-1516, slip op. (N.C. Ct. App. 20 May 2008) (R pp. 220-223, 262-267).

Simultaneously upon filing the Plaintiff's Notice of Appeal, the Plaintiff duly served the Defendant and the State with the Public Information Request (See Exhibit 25). NCDHHS and NCDOA provided extensive documentation regarding

maintenance and record retention practices in the UNC System (See Exhibits 1, 2, 3, 4, 5, 6, 9, 10, 11, 13, 14, 15, 16, 18, 20, 21, 22, 23, and 26). NCDOCR provided the record retention and disposition schedule for the UNC system (See Exhibits 24 and 29). The Plaintiff referenced or presented various documentation before the North Carolina Industrial Commission through discovery responses and with the Plaintiff's Motion to Compel in 2006 relevant to this Motion (See Exhibits 7, 8, 12, and 19). These documents were excluded from the Record on Appeal as the subject of this Appeal was not the conduct of the Defendant. On 24 July 2008, the Defendant responded with a letter, from Vice Chancellor Charles Leffler, stating that Wood Hall was renovated in various projects, including, but not limited to, replacement of the roof, and installation of new heating, ventilation, and air conditioning controls, and a comprehensive modernization (See Exhibit 28). The Defendant also presented copied of a report on investigation from 2004 (See Exhibit 17).

JUSTIFICATION FOR THE MOTION FOR TEMPORARY STAY

Pursuant to Rule 23 of the North Carolina Rules of Appellate Procedure, a Motion for Temporary Stay is appropriate upon the submission of an application for writ of Supersedeas. An application for Writ of Supersedeas is appropriate "to stay the execution or enforcement of any judgment, order, or other determination of a trial tribunal which is not automatically stayed by the taking of appeal when an appeal has been taken or a petition for mandamus, prohibition, or certiorari has been

filed to obtain review of the judgment, order, or other determination; and (i) a stay order or entry has been sought by the applicant by deposit of security or by motion in the trial tribunal and such order or entry has been denied or vacated by the trial tribunal, or (ii) extraordinary circumstances make it impracticable to obtain a stay by deposit of security or by application to the trial tribunal for a stay order." A motion for temporary stay is appropriate in order to immediately stay the proceedings pending the ruling on the Petition for Writ of Supersedeas.

The Plaintiff shows that the Plaintiff filed a Motion to Compel the Defendant to respond to the Plaintiff's Discovery Request with the North Carolina Industrial Commission in timely and proper response to the Defendant's Motion for Summary Judgment and Motion to Suspend Discovery (R pp. 32-175). In the Plaintiff's Motion to Compel and the Plaintiff's Response to the Defendant's Motion for Summary Judgment and Motion to Suspend Discovery made specific reference to a press release dated 31 January 2006 announcing the closure and renovation of Wood Hall (R pp. 32-175). The Plaintiff further argued that the renovation could prejudice the Plaintiff in the proceedings, and that the expert opinions providing grounds for the renovation may provide evidence to support the Plaintiff's defense of the Defendant's Motion for Summary Judgment. Not only would renovation eliminate the Plaintiff's ability to send experts to inspect the demised premises, but expert opinions regarding the conditions of the present in the facility could provide evidence that the general public was equally exposed to the hazards allegedly the cause of this injury. Without substantial documentation, this renovation would

prejudice the Plaintiff's ability to obtain evidence in support of these contentions (R pp. 32-175). The North Carolina Industrial Commission dismissed this claim without ruling on the Plaintiff's Motion (R pp. 220-223, 262-267). At the time the North Carolina Industrial Commission extinguished this claim, the motions pending before the North Carolina Industrial Commission were null and void. Further, the order staying the proceedings and the discovery, granting the Defendant's Motion to Suspend Discovery pending a ruling on the Defendant's Motion for Summary Judgment, was dissolved and no longer in full force and effect, and the proceedings were removed from the North Carolina Industrial Commission. Despite the fact that the Tort Claims Act, N.C. Gen. Stat. § 143-291 et seq., stays all determinations of the North Carolina Industrial Commission pending appeal, the absence of a ruling on the Plaintiff's Motion to Compel and the failure to address the application for intervention and injunctive relief of the Plaintiff has made it impracticable for the Plaintiff to obtain a stay before the trial court. Furthermore, the Defendant has remained silent on the issue of the renovation through these proceedings, both before the North Carolina Industrial Commission and the North Carolina Court of Appeals (See Defendant's Motion to Dismiss) (R pp. 6-31, 214-218, 252-261). The Defendant's Response to the Petition for Writ of Supersedeas is without merit, whereas the Plaintiff is not seeking a stay of the judgment dismissing this claim, but of the failure of the North Carolina Industrial Commission to rule on the application for intervention and injunctive relief submitted by the Plaintiff. As no order was entered ruling upon said

application and the Plaintiff's Motion to Compel, and no ruling was incorporated into the decision dismissing the Plaintiff's claim, the Tort Claims Act, § 143-291 et seq., is silent on this issue.

In order circumvent the suspension of discovery, the Plaintiff served the Defendant, and the State Government, with the Public Information Requests in order to obtain evidence to support the claims herein and in the Plaintiff's Notice of Appeal (See Exhibits 25, 26, 27, 28, and 29). In pertinent part, the Plaintiff has presented three (3) principle arguments in response to the Defendant's affirmative defense. By established standard, the Plaintiff must present a prima facie case, genuine issues of material fact and triable issues of fact in order to sustain the claim against dismissal. Pursuant to the Workers' Compensation Act, N.C. Gen. Stat. § 97-1 et seq., and applicable case law and precedents, the Plaintiff presented various arguments to show that the employment relationship between the Plaintiff, as employee, and the Defendant, as employer, does not invoke the exclusivity provisions of the Workers' Compensation Act, § 97-1 et seq., without additional findings. Moreover, the Plaintiff presented an objection that there was not sufficient evidence to support the finding that injury arose by accident out of and in the course of the employment (See Plaintiff's Notice of Appeal).

Firstly, the Plaintiff showed that the absence of credible evidence concerning the injury and the conditions present in the subject facilities should have been viewed in the light most favorable to the non-moving party, the Plaintiff (See the Plaintiff's Notice of Appeal) (R pp. 32-175, 177-213, 227-250). However, with the new evidence obtained, the

Plaintiff now shows the following with respect to this response to the Defendant's affirmative defense. NCDHHS, NCDOA and NCDOCR have confirmed the acceptable maintenance, inspection and assessments standards, as well as the record retention schedule for the UNC System, of which the Defendant's University is a constituent institution (See Exhibits 1-11, 13-16, 18, 20-24). Further, NCDHHS, NCDOA and the Defendant have confirmed that acceptable maintenance, inspection and assessments standards have not been upheld at nearly all of the UNC System constituent institutions, including the Defendant's University (See Exhibits 1-11, 13-18, 20-24). Evidence previously presented by the Plaintiff supports these findings (R pp. 32-175) (See Exhibit 7, 8, 12, and 19). A 2004 report conducted by officials at the Defendant's University confirmed the indoor environmental hazards and indoor air quality concerns were such that the general public was equally exposed (See Exhibit 17). Case law and precedents does not support that the mere fact of physical location is adequate to show the causal connection between employment and an injury. The claimant, the Defendant, must show a causal connection between the tasks associated with the employment and the injury in question. See *Jackson v. Fayetteville Area Sys. of Transp.*, 78 N.C. App. 412, 337 S.E.2d 110 (1985); *Hargus v. Select Foods, Inc.*, 271 N.C. 369, 156 S.E.2d 737 (1967); *Perry v. American Bakeries Co.*, 262 N.C. 272, 136 S.E.2d 643 (1964); *McNeely v. Carolina Asbestos Co.*, 206 N.C. 568, 174 S.E. 509 (1934); *Lovette v. Reliable Mfg. Co.*, 262 N.C. 288, 136 S.E.2d 685 (1964); *Wallace v. Music Shop, II, Inc.*, 11 N.C. App. 328, 181 S.E.2d

237 (1971); *Ruffin v. Compass Group USA*, 150 N.C. App. 480, 563 S.E.2d 633 (2002); *Harden v. Thomasville Furn. Co*, 199 N.C. 733, 155 S.E. 728 (1930); *Massey v. Board of Educ.*, 204 N.C. 193, 167 S.E. 695 (1933); *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 233 S.E.2d 529 (1977).

Moreover, this causal connection is null and void against evidence that the injury was caused by a hazard to which the general public is equally exposed. *Rutledge v. Tultex Corp.*, 308 N.C. 85, 93-4, 301 S.E.2d 359, 365 (1983). Further evidence of the general nature of the hazards are that (i) the media coverage of 2003 and 2004 shows that the Defendant, as well as other constituent institutions of the UNC System, addressed the concerns as they affected the student, staff, faculty, and all others collectively, and did not evidence any special considerations or specifically different hazards for employees, staff or faculty, (ii) the administrative memorandum and the case study produced by the Plaintiff did not evidence any special considerations or specifically different hazards for employees, staff and faculty as opposed to students, staff, faculty and all others collectively, (iii) NCDHHS and NCDOA inspections of other state-owned facilities, particularly residential facilities, did not evidence any special considerations or specifically different hazards for employees, staff and faculty as opposed to students, staff, faculty and all others collectively, and (iv) all of the pleadings submitted by the Defendant to the North Carolina Industrial Commission and the North Carolina Court of Appeals is silent on this issue (R pp. 6-31, 214-218, 252-261) (See Exhibits 1-29). The findings of the North Carolina Industrial Commission were silent on this issue (R pp. 220-223, 262-267). Based upon this

contention, the Plaintiff moved for the North Carolina Industrial Commission to deny the Defendant's Motion for Summary Judgment and Motion to Suspend Discovery on grounds that pending discovery must be had before the Motion could be heard (R pp. 32-175). While the contended subject of this appeal is not public policy, environmental issues, issues of public health, or hazards to the general public, this contention required findings as to public policy, environmental issues, issues of public health, and hazards to the general public (See Plaintiff's Notice of Appeal).

Secondly, the Plaintiff presented evidence showing that, even with the employment relationship as previously identified, the Plaintiff and the Defendant were not subject to and had not complied with the provisions of the Workers' Compensation Act, § 97-1 et seq., in order to invoke the exclusivity provisions therein (See Plaintiff's Notice of Appeal) (R pp. 32-175, 177-213, 227-250). Components of this contention included, but were not limited to, evidence showing that (i) the injury was not caused by an accident, as defined by the Workers' Compensation Act, § 97-1 et seq., and applicable case law and precedents, (ii) the injury was caused by a hazard associated with a task of the employment, but a hazard associated with the package for compensation for the employment, and (iii) the injury did not result in a disability or eligibility of compensation for the Plaintiff as the Plaintiff did not lose wages, as defined by the Workers' Compensation Act, § 97-1 et seq., and applicable case law and precedents (See Plaintiff's Notice of Appeal) (R pp. 32-175, 177-213, 227-250). In support of this contention, the Plaintiff shows that NCDHHS,

NCDOA and NCDOCR have confirmed the acceptable maintenance, inspection and assessments standards, as well as the record retention schedule for the UNC System, of which the Defendant's University is a constituent institution (See Exhibits 1-11, 13-16, 18, 20-24). Further, NCDHHS, NCDOA and the Defendant have confirmed that acceptable maintenance, inspection and assessments standards have not been upheld at nearly all of the UNC System constituent institutions, including the Defendant's University, from and before August 2002 (See Exhibits 1-29). The employment relationship of between the Plaintiff and the Defendant commenced in August 2002 and terminated in September 2003. Not only was the Plaintiff exposed to hazards from and before August 2002, but the Plaintiff was also exposed to conditions which the Defendant knew were substantially certain to cause serious injury or death during employment. Pursuant to the Workers' Compensation Act, § 97-1 et seq., and applicable case law and precedents, the Plaintiff is eligible to maintain a common law claim for remedy given the intentional misconduct and negligence of the Defendant, even as an employer. See *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991).

Lastly, the Plaintiff argues that, given the Plaintiff is not eligible to receive compensation under the Workers' Compensation Act, § 97-1 et seq., denial of the right to maintain a common law claim is a violation of the rights of the Plaintiff under the Constitution of the United States and the Constitution of the State of North Carolina (See Plaintiff's Notice of Appeal) (R pp. 32-175, 177-213, 227-250). The aforementioned evidence obtained in response to the Public Information Requests further

supports that the Plaintiff is no eligible to receive compensation under the Workers' Compensation Act, § 97-1 et seq. (See Exhibits 1-29). The Workers' Compensation Act, § 97-1 et seq., and applicable case law and precedents, does not preclude the Plaintiff from maintaining a common law claim as the Workers' Compensation Act, § 97-1 et seq., is not an effective administrative remedy (See Plaintiff's Notice of Appeal) (R pp. 32-175, 177-213, 227-250).

In the Defendant's Motion to Dismiss this Appeal, the Defendant argues that this Constitutional question was not maintained throughout these proceedings. This Constitutional question was maintained from and after the time of the Constitutional violation, which was the dismissal of this claim by the North Carolina Industrial Commission. Further, while the North Carolina Industrial does not have jurisdiction to hear claims alleging Constitutional violations, the North Carolina Industrial Commission is authorized to hear questions concerning its own statutory jurisdiction, including the Constitutional questions arising therefrom. The Defendant presented no contention or contradicting precedents to this standard (R pp. 10-31). The Plaintiff duly presented argument based on the questions of classifications which are the basis of this Constitutional question before the North Carolina Industrial Commission (See Plaintiff's Notice of Appeal) (R pp. 32-175, 177-213, 227-250). The North Carolina Industrial Commission is further barred by the United States Constitution from engaging in any act repugnant to the provisions thereof, including, but not limited to, denying a substantial right to the Plaintiff, or providing the Plaintiff equal protection under the

law (See Plaintiff's Notice of Appeal) (R pp. 32-175, 177-213, 227-250). Equal protection in seeking remedies for civil tort is embodied in this principle. The Defendant's Motion to Dismiss this Appeal is without merit in this regard. Moreover the Defendant's cited case law and precedents in the Defendant's Motion to Dismiss support the claims of the Plaintiff. See *Burgess v. Gibbs*, 262 N.C. 462, 137 S.E.2d 806 (1964); *Fender v. G.E. Co.*, 260 F. Supp. 75 (W.D.N.C. 1966); *Fender v. G.E. Co.*, 380 F.2d 150 (4th Cir. 1967); *Wright v. Wilson Mem. Hosp.*, 30 N.C. App. 91, 226 S.E.2d 225 (1976); *Horne v. G.E. Co.*, 716 F.2d 253 (4th Cir. 1983); *Dolbrow v. Holland Indus., Inc.*, 64 N.C. App. 695, 308 S.E.2d 335 (1983); *Freeman v. SCM Corp.*, 311 N.C. 294, 316 S.E.2d 81 (1984); *Pangburn v. Saad*, 73 N.C. App. 336, 326 S.E.2d 365 (1985); *Matthews v. Charlotte-Mecklenburg Hosp. Auth.*, 132 N.C. App. 11, 510 S.E.2d 388 (1999); *Whitaker v. Town of Scotland Neck*, 357 N.C. 552, 597 S.E.2d 665 (2003); *Powers v. Robeson County Memorial Hospital, Inc.*, 242 N.C. 290, 87 S.E.2d 510 (1955).

In *Burgess*, *Dolbrow*, *Powers*, *Fender*, and *Wright*, there was no dispute as to the nature or circumstances of the injury, and adequate findings that injury arose by accident out of and in the course of employment were made. In *Freeman*, the finding that there is no exception to N.C. Gen. Stat. § 97-10.1 for employee against employer was overturned by *Woodson*. In *Whitaker*, *Woodson* is found to be a qualified exception to the Workers' Compensation Act, § 97-1 et seq.

In *Pangburn*, the Court held that immunity in the Workers' Compensation Act, § 97-1 et seq., does not qualify for willful, wanton or reckless negligence

for intentional acts. This disqualification and exclusivity provision was modified by *Woodson* in 1991 to include intentional misconduct of the employer as well. The Court further held that, while the Workers' Compensation Act, § 97-1 et seq., exclusivity provisions and the Tort Claims Act, § 143-291 et seq., immunity clauses do not violate the Equal Protection clause or open courts clause and the statutes have rational relationships to legitimate governmental interests, where the Workers' Compensation Act, § 97-1 et seq., or the Tort Claims Act, § 143-291 et seq., has no application, the exclusivity provisions and immunity clauses thereof also have no application. The Court also held that State invocation of the Workers' Compensation Act, § 97-1 et seq., exclusivity provisions and the Tort Claims Act, § 143-291 et seq., immunity clauses cannot be repugnant to Article I, Section 18 of North Carolina Constitution, Article I, Section 19 of North Carolina Constitution, or the Fifth Amendment or Fourteenth Amendment of the United States Constitution. The Court explicitly found that claims for damages caused by intentional tort or gross negligence of employees or employers not subject to § 97-10.1. This precedent was modified by Woodson in 1991 to include intentional misconduct. The Court further held that dismissal is appropriate only if it appears there is no remedy on the face of the complaint and subsequent pleadings.

In *Matthews*, the Court held that the Commissions findings are conclusive if supported by the competent evidence; administrative termination of proceedings on grounds not provided by statute is questioned; Workers' Comp is to be liberally construed and benefits not to be denied by strict or

narrow interpretation; all trials should be held on the merits surrounding disc

overy rules and reviewed based on the abuse of discretion standard; an unverified application and written motion, otherwise unsupported by the record, is not competent evidence to grant said motion; denial of the opportunity to be heard and collect evidence and introduce new evidence and discovery is the denial of a substantial right in litigation; evidentiary hearings and discovery must be had when the record is insufficient to hear the matter at trial; and, denial of opportunity to be heard is a violation of a substantial right.

The Defendant's Motion to Dismiss this Appeal is completely without merit. Moreover, the Defendant has engaged in misconduct by moving to destroy evidence relevant to these proceedings. In addition, the reports provided by the Defendant are not to the standard established by the NCDHHS and NCDOA. Accordingly, the Plaintiff asserts that the Defendant has not made a complete disclosure, the Defendant has destroyed relevant records on file, or the Defendant failed to adequately inspect the premises as per NCDHHS and NCDOA standards.

As relief, the Plaintiff prays the Court immediately order the Defendant to account and itemize all documents, records, files and other physical matter relevant to the Plaintiff's Discovery Request of 1 May 2006. The Plaintiff further prays the Court will provide additional remedy as deemed appropriate.

JUSTIFICATION FOR THE MOTION TO AMEND THE RECORD ON APPEAL

In consideration of the foregoing, the Plaintiff prays that the Court grant the Plaintiff leave of court to amend the record on appeal to include the evidence presented before the North Carolina Industrial Commission, as itemized with this Motion. In addition, the Plaintiff further prays the Court allow the Plaintiff to amend the record on appeal with the evidence referenced in discovery proceedings between the Plaintiff and the Defendant, as the Plaintiff had acquired these public record documents from third parties, however, transmission was not required pursuant to the North Carolina Rules of Civil Procedure as said documentation is not material to the claims of the Plaintiff. The Plaintiff shows that the evidence in this proceeding was not closed, discovery was suspended, and the Plaintiff reserved the right to present said evidence at any time same is relevant in these proceedings until the close of evidence. Moreover, pursuant to Rule 23 of the North Carolina Rules of Appellate Procedure, the Plaintiff is authorized to present new evidence that does not appear on the trial court record or the Appellate Record on Appeal, if same is relevant to the facts showing the need for extraordinary relief.

JUSTIFICATION FOR THE MOTION TO EXPEDITE THIS APPEAL

In consideration of the foregoing, the Plaintiff prays that the Court expedite this Appeal, given the conduct of the Defendant and the destruction of evidence relevant to these proceedings. Given the decision to expedite this appeal is at the discretion of the Court, the Plaintiff respectfully requests and

prays for this appeal to be expediting for good cause shown.

CONCLUSION

In conclusion, the Plaintiff prays this Supreme Court will allow the Plaintiff's Notice of Appeal of Right, certify this matter for discretionary review and issue a Writ of Supersedeas to preserve the record.

Respectfully submitted, this the 20th day of August 2008,

PETITIONER
PLAINTIFF-APPELLANT
/s/ JOSEPH KAMAU CHRISTOPHER BEY
Pro Se

APPENDIX G

EXCERPTS FROM EXHIBIT R TO THE PLAINTIFF'S RESPONSE TO THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND MOTION TO SUSPEND DISCOVERY

North Carolina State University
Facilities Profile and 10-Year Capital Plan
Eva Klein & Associates, Ltd.
December 1999

PREFACE

Purpose

In 1997 and 1998, the North Carolina General Assembly mandated that the Board of Governors of The University of North Carolina conduct a Study of Capital Equity and Adequacy and prepare a 10-Year Capital Plan—to identify capital needs of each institution for all categories of facilities.

This Facilities Profile and Capital Plan for North Carolina State University is one of 16 individual reports prepared from data developed in the Study. Its purpose is to summarize, in one place, all facilities-related information and capital needs for NC State from:

- Existing statistical data about the institution's mission, campus population, and campus facilities
- Campus Visit interviews and tours
- Compilation of 10-Year Capital Plan needs, based on the technical analyses conducted for the Study

- Organization of "Phase 1" (years 1-5) with a schedule of projects proposed for state funding and with a Matrix of Financing Responsibility, for all financing sources. . . .

North Carolina State University
10-Year Capital Plan Summary
Matrix of Financing Responsibility and Proposed Annual Schedule of Phase I State-Funded Projects . . . Total 10-Year Plan Needs 1,492,945,366 . . .

CAMPUS VISIT AND TOUR

Interview Comments

Mission. The general understanding of all interviewees was the role that NC State plays in economic development through the creation and dissemination of knowledge.

- Science, engineering technology, knowledge generation and dissemination, and teaching are our primary missions.
- We are more about economic development than any other institution in the State and it is a responsibility we accept.
- We have a statewide commitment to serve the citizens of North Carolina and not just through Agriculture Extension programs but through our entire Extension programs. A part of our research mission is to meet the needs of the State today.
- We have special relationships with the agriculture, forestry, textiles, and engineering communities. We have a statewide commitment to all these industries.

- We are basically the science and technology university of the state system. Service and extension of that research throughout the State is what sets us apart from the rest of the universities in the system.

Facilities Issues. Most interviewees expressed concern about the quality and quantity of the space that the campus has. In general the following statements describe the extent and size of the campus.

- There are 311 buildings on the campus comprising 9.4 million GSF. There are an additional 322 buildings located off-campus with 1 million GSF of space. These are just the buildings supported by appropriations.
- Receipts support 51 percent of the space on campus and only 49 percent is supported by the General Fund.
- Twenty-five years is when a building needs major renovations. Fifty-eight percent of the buildings on-campus are older than 25 years and only 10 percent of them have been renovated.
- Twenty-six percent of the buildings have no air conditioning, 32 percent are air conditioned with inefficient window units. Only 42 percent of the buildings have efficient air conditioning systems and these are primarily on the Centennial Campus.

Condition/Quality. Interviewees expressed concern about the poor condition of the main campus and the desire of everyone to move to the Centennial Campus.

- Centennial Campus has saved NC State. Without this campus, we would not be the institution we are today. The rest of the campus is constrained.
- We have labs on the main campus no better than you would find in secondary educational institutions.
- Teaching labs are the worst part of the problem. With the changes in technology, we are having a tough time keeping up.
- Asbestos removal, environmental controls, and safety issues are the biggest problems we need to address.
- We prepare teachers on this campus in facilities that are not comparable to the facilities they will have in the high schools.
- There is general lack of aesthetics and beauty on the campus. There is no landmark building. There is no special place that is a signature of the institution.
- We are allowing programs to exist that have serious safety issues. We need the right facilities to take care of current enrollments.
- We got a $1 million endowed chair and tried to hire the best person in the world to fill the position. He laughed at us because our facilities and infrastructure are so poor.

Capacity. Interviewees commented on the lack of teaching lab space for the sciences and overcrowded conditions in the student recreation areas.

- To serve the chemistry students, we had to divide them into two groups with lecture one week and labs the next week.

- Our research growth and partnering is exponential and we are having a tough time being able to accommodate everyone that wants to join with us.
- There are not enough classrooms to meet our needs. We have only started renovating classrooms in the last five years.
- There is severe shortage of space in the student areas. Also, we have a problem with trying to meet the needs of the community with this limited space.
- Our targeted enrollment is 31,000 students and we will need more space to accommodate this growth. Also, research space is relational with enrollment growth.

Land Issues. NC State has 103,000 acres throughout the State with only approximately 2,000 acres comprising the three main campuses. Land is held in three entities: State, endowment, and foundation lands. Only the foundation land is not tax-exempt.

Infrastructure. Given the size of the campus, interviewees at NC State expressed concern that the infrastructure of electrical, steam lines, water, sewer, and telecommunications is not counted as a part of the CRV of the campus. This method undervalues the true CRV and reduces the amount of funds available from R&R to address upkeep and repairs to these critical systems. (Note: In the April 1999 report to the Board of Governors, EKA has recommended this change—to add infrastructure CRV to the R&R Reserve formula.)

Staffing and Budget. Interviewees expressed concern about the move by the General Assembly to

use part of the R&R funds to help pay for the Technology Infrastructure Expansion program. It was felt that this sets a dangerous precedent for using R&R funds for purposes other than those for which the money was designated originally. Concern was expressed that the R&R funds are insufficient to address the deferred maintenance needs . . .

APPENDIX H

EXHIBIT A TO THE PLAINTIFF'S RESPONSE TO THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND MOTION TO SUSPEND DISCOVERY

MEMORANDUM

Administrative Memo
NC State University
Residence Halls

Submitted by: J. Christopher[;] Title: RA
Date: 10/08/2002[;] Time: 4:00 AM
Building: Wood Hall A[;] Room #209H
Phone #512-1859

Date of Incident: 9/23/02-Present[;] Time: n/a
Location (Building)(Room): Wood Hall
Subject(s) Involved: [NAMES REDACTED]

On Tuesday, September 24, 2002, [NAME REDACTED] was experiencing sore throat and labored breathing. He went to the Student Health Center where they performed a number of test and found no diseases. He was given an antibacterial mouthwash for the sore throat and sent home. Two days later on Thursday, September 26, 2002, [NAME REDACTED] was taken to the hospital with an enflamed tonsil. The tonsil was [protruding] out of his throat and also preventing breathing. The doctors at Wake Med gave [NAME REDACTED] [Novocain] and gave him ten incisions in his tonsil to let the

infection that enlarged the organ drain out. Wake Med also put [NAME REDACTED] on [penicillin].

On Saturday, September 28, [NAME REDACTED] was taken the hospital. He was treated and tested for various diseases and all test came up negative. He was admitted overnight, given a cat scan and administered Morphine and other pain killers for the migraine headaches. [NAME REDACTED] also experienced [weight loss], loss of appetite, [vomiting], nausea and flu like symptoms.

On Monday, September 30, 2002, Resident Advisor J Christopher was experiencing migraine headaches, shortness of breathe, clogged sinus conditions, flu like symptoms, coughing, loss of appetite, loss of over fifteen pounds after already being underweight, [vomiting] and nausea. He missed all of his morning classes that day and went to the Student Health Center. After drawing four viles of blood and taking a urine test, the Student Health Center found no identified diseases, but did notice significant [weight loss] and a viral strand in the blood. Blood cell counts were normal eliminating mono or any other typical viral disease. Later that day, [NAME REDACTED] informs Wood Hall Resident Advisor J Christopher that her air conditioning unit in her room was growing mold and mildew. [NAME REDACTED] had been experiencing similar ailments without cause and was concerned. [NAME REDACTED] also noticed the smell of the mildew and mold when she entered the suite.

[NAME REDACTED] complained of nausea, headaches, sore throat and shortness of breathe to do a restricted air canal. Her parents removed her from the building on Thursday, October 3, 2002. While picking up her up, her father noticed the smell of

mildew and mold. While away from the building, her condition drastically improved. When she returned with her father, he opened the air conditioning unit and attempted to clean the green growth inside.

On October 2, 2002, [NAME REDACTED] was experiencing light-headedness, headaches and flu like symptoms after visiting for two hours in the middle afternoon.

[NAME REDACTED] receives allergy shots every week. Last week, the doctor at the Student Health Center refused to give her an allergy shot because of her enflamed tonsils. She was also experiencing nausea, sore throat and headaches. The doctor recommended that she take penicillin to combat the [inflammation] and if it did not clear up, she would be given an antibacterial mouthwash this week.

[NAME REDACTED] experienced chronic coughing. [NAME REDACTED] experienced sore throat and enflamed tonsils. [NAME REDACTED] experienced headaches and nausea.

The air conditioning unit in room 209H was cleaned on Monday, October 7, 2002 by [NAME REDACTED] and another employee of University Housing. Inside of the unit, the drainage pipe for the condensation that builds up on the coils was clogged. The water intended for the reservoir was orange with growth. Water and condensation also dripped onto the air filter most likely causing additional growth which was masked by the unprecedented dust on the filter. A mildicide spray was applied to the unit. Maintenance also informed J Christopher that filters were to be changed every six months and that the filter should have been changed over the summer. It was apparent that the filter was at least a year old.

APPENDIX I

EXHIBIT F TO THE PLAINTIFF'S RESPONSE TO THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND MOTION TO SUSPEND DISCOVERY

LETTER

North Carolina
Department of Health and Human Services
Division of Public Health
Epidemiology Section
1912 Mail Service Center
Raleigh, North Carolina 27699-1912

January 23, 2004

Mr. J. Kamau Christopher
[North Carolina State University]
[jkchrist@unity.ncsu.edu]
243 Clinton Place
Newark, New Jersey 07112

Dear Mr. Christopher:

I am responding to your case study concerning mold at North Carolina State University. My response is on behalf of the Governor's Office and the Division of Public Health. Currently the Division of Public Health is the state agency designated to address health related mold issues in all state government buildings, including the university system.

The Division of Public Health, in cooperation with the State Construction Office, has implemented a program for responding to mold related concerns in specific state owned or leased buildings. A key aspect of the program is to work through the safety and health office of the agency or university whenever mold situations or complaints arise. Therefore, we will be working with the Environmental Health and Public Safety Center at North Carolina State University concerning your case study. I encourage you to contact the Center directly. The person to contact is David Rainer at 515-4238.

Please feel free to contact me directly at (919) 733-0200 if I can be of further assistance.

Sincerely,
/s/ PAT CURRAN
Pat Curran, CIH
Manager
Health Hazards Control Unit

cc: David Rainer
darainer@qw.fis.ncsu.edu

APPENDIX J

EXCERPTS FROM EXHIBITS 15, 16, 18, AND 26 TO THE PLAINTIFF-APPELLANT-PETITIONER'S MOTION FOR TEMPORARY STAY, MOTION TO AMEND THE RECORD, AND MOTION TO EXPEDITE THIS APPEAL

LETTER

North Carolina
Department of Health and Human Services
Office of Public Affairs
2001 Mail Service Center
Raleigh, North Carolina 27699-2001

June 23, 2008

J. Christopher Bey
c/o Sharon Bey-Christopher, Managing Attorney
Legal Aid of North Carolina, Inc.
108 Gold Street East
P.O. Box 2688
Wilson, North Carolina 27894-2688

Dear Mr. Bey,

Enclosed are the public records you requested from NC DHHS in your letter dated May 29, 2008 and in your follow-up, expanded request letter dated June 18, 2008. . .

Sincerely,
/s/ CAROL D. SCHRIBER
Carol D. Schriber . . . Public Affairs Office

REPORT OF INSPECTION

Dial Humanities Building
University of North Carolina at Pembroke

Report of Inspection by
State Construction Office Consulting Services Section

[December, 2003]

Background

On [December 9, 2003,] an inspection of Dial Humanities Building was conducted. The inspection team was composed of members of Department of Administration State Construction Office and Department of Health and Human Services Division of Public Health. Presence, impact and possible resolution of mold were the reasons for the inspection. The building had not been occupied since [October 16, 2003]. The team reviewed reports of inspections conducted by [S.&M.E.,] Inc. and Trigon Engineering Consultants, Inc., conducted in October and November respectively, prior to its own inspection.

Dial Humanities Building has approximately 31,000 [square feet] on two floors; it was designed by Hayes, Howell and Associates and built in 1979. The building houses classrooms, faculty offices and audio-visual rooms. Its structural system is reinforced by concrete. Exterior façade is brick, with horizontal bands of windows on both levels.

Inspection

The exterior wall system consists of 4 inch brick veneer, a 2 inch cavity, and a 6 inch metal stud wall system. There are metal ties between the wythe of brick and the metal stud wall system. The metal stud wall system consists of a vapor barrier facing the cavity and installed over a light-weight gypsum wall sheathing; there is 6 inch fiberglass batt insulation in the stud space with a kraft-paper vapor barrier facing the building interior; over the interior face of the stud is ½ inch gypsum wall-board, finished with vinyl wall covering or paint.

Problems with the metal ties were noted, including some severe deficiencies in their original installation, and in some cases their complete deterioration due to rust.

A significant amount of mold growth has been revealed on the interior gypsum wall board. A very obvious source of water penetration is at the row-lock brick window sill. The design and construction of the sill provided no solid support under the back side of the row-lock, which should remain high to shed water away from the base of windows. In many cases, the surface of the brick at the window is now obviously lower than at the outside ends of the brick. There is composite flashing under the row-lock, which should catch water that does enter the wall at the sill. The problem here is that no weep holes on the flashing were called for in the details, nor installed during construction, to expel the water.

Another possible problem with the flashing that is also mentioned in one of the previously-referenced reports is that the flashing was installed without end-dams. Such a condition would allow

water on the flashing to run into the walls at the ends of the flashing.

Further investigation revealed significant rusting/deterioration of the bottom runner of the metal stud system.

There was considerable evidence of water and mold on the exterior wall of [Conference] Room 251 that could not have been caused by the window-sill situation.

The roof was inspected, and it appears to be quite serviceable, adequate, and not likely to be the source of significant water penetration.

Recommendations

Solutions to the problems with Dial Building should be phased. The first operation should be a demolition contract to remove all gypsum wall board and batt insulation from (the inside of) all exterior walls. This will allow a more accurate assessment of existing conditions, and it will also be a more thorough way to arrest/eliminate mold. Perhaps simultaneous with the first operation, a new design for a more correct window sill could still be performed. New replacement windows could perhaps be ordered. The present windows themselves are not believed to be the source of water penetration. It would, however, be nearly impossible to remove, retain, and reinstall the present windows successfully. Structural evaluation of the metal studs, stud track, and the adequacy of the metal tie connections between the brick veneer and the metal studs, would be the next order of business. Design of remedial repairs to address whatever deficiencies the structural evaluation revealed would then need to be

performed. Remedial repairs should be combined with window and sill work, into a single construction contract. New insulation and gypsum wall board, could be a separate construction package.

Thank you for calling on the Consulting Services Section of the State Construction Office to help with this work.

Ron Little, AIA/Architect
Buddy West, PE/Structural Engineer

MEMORANDUM

North Carolina
Department of Health and Human Services
Division of Public Health
Epidemiology Section
1912 Mail Service Center
Raleigh, North Carolina 27699-1912

December 19, 2003

To: John J. "Pat" Curran, Manager, Health Hazards Control Unit
From: David Lipton, Industrial Hygiene Consultant, and Danny Lineback, Industrial Hygiene Consultant
Subject: NCCU Residence Halls One and Two, Suites Heating and Air-Conditioning Systems

On December 8, 2003, we conducted a survey of New Residence Halls One and Two at North Carolina Central University (NCCU). Our purpose was to examine and evaluate the building as consultants to the State Construction Office on renovation of the buildings to prevent mold growth. Tom Roberts from the State Construction Office and Mike Logan from the NCCU safety office accompanied us. The major area of concern for this visit was to examine the condition of Heating and Ventilation and Air Conditioning (HVAC) systems for suites and to make recommendations for renovations of the units.

Each suite has an independent HVAC system. A system consists of a vertical fan coil unit and fibrous glass lined metal air supply ducts. Air ducts run above the gypsum board ceiling. Air returns to

the fan coil through the occupied zone. A thermostat located in the hall is used to control temperature. Reportedly low efficiency filters were used in the systems. Extensive moisture problems in fan coil units in both buildings such as water accumulation in the bottom, and construction issues, such as poorly installed condensate drain pans and piping has been previously described and documented.

We examined the interior air ducts in Suite 340 of both buildings. The coated fibrous glass surfaces had significant accumulations of dust and debris. The bottoms of the air ducts were covered in a white material. Samples of the fiberglass insulation from these areas as well as from other locations were collected and submitted to the State Laboratory of Public Health where samples of the surface materials will be analyzed by light microscopy. As of the date of this memo we have not received written laboratory results. However, the analyst reported some visible water stains on insulation samples. The white materials were most likely calcium carbonate and calcium sulfate (gypsum board) and there were a few spores and hyphae. The complete report will be forwarded to you when it is received.

Recommendations and Discussion

It is our understanding that the fan coil units are to be replaced as part of the renovation project. We recommend that insulation inside air ducts [be] removed and that no insulation inside air ducts should be used in the renovation project.

Our recommendation is based on the following reasons: There are reports that insulating materials stayed wet for extensive time periods. Moisture may have compromised the surface coating and insulating

properties of the fibrous glass. There is concern about durability of coating or encapsulating materials to provide a 20 or 30 year service life. These same concerns extend to the thermal and acoustical insulation inside air ducts in heavy use facilities such as dormitories. Because this is a high profile project the knowledge that no insulation was left inside air ducts will add to the perception that the buildings are clean and healthy. Although not recommended, if insulation inside air ducts is to be retained, it should be commercially cleaned. A firm following both the National Air Duct Cleaners Association and North American Insulation Manufacturers Association standards should perform the cleaning and guidelines for cleaning lined ductwork before any kind of encapsulating materials could be applied.

Conclusion

This memo describes conditions observed on December 8, 2003, and recommendations are based on good industrial hygiene practice. Please feel free [to contact] us with any questions or to clarify any information in this report.

DL/DL:bc

cc: Greg Driver, State Construction Office

MEMORANDUM

North Carolina
Department of Health and Human Services
Division of Public Health
Epidemiology Section
1912 Mail Service Center
Raleigh, North Carolina 27699-1912

January 5, 2004

To: John J. "Pat" Curran, Manager, Health Hazards Control Unit
From: David Lipton, Industrial Hygiene Consultant
Subject: NCCU Residence Halls One and Two, Suites Heating and Air-Conditioning Systems, Mold Sample Results

The table below summarizes the microscopic examination of samples of coated fiberglass insulation collected from interior air ducts at the NCSU New Residence Halls on December 5, 2003. . . . Mold spores were found in every sample and large numbers of spores and hyphae were found in four of seven samples. Spores and hyphae indicate there was fungal growth in the insulation. Synthetic fibers, cotton fibers, starch, and pollen were found in relatively small amounts with no apparent pattern of distribution. These materials are common in the indoor environment and could be generated from outdoor sources, occupant sources or during the mold remediation. Amorphous debris, opaques, CaCO3 (Calcium Carbonate) and CaSO4 (Calcium Sulfate) would be consistent with dust from cutting gypsum board materials during the mold remediation.

The results confirm our previous recommendations that interior insulation in the air-ducts for the suites should be removed.

DL/bc

cc: Danny Lineback, Industrial Hygiene Consultant

APPENDIX K

EXCERPTS FROM EXHIBITS 17 AND 28 TO THE PLAINTIFF-APPELLANT-PETITIONER'S MOTION FOR TEMPORARY STAY, MOTION TO AMEND THE RECORD AND MOTION TO EXPEDITE THIS APPEAL

LETTER

North Carolina State University
Office of Finance and Business
Holladay Hall
Campus Post Office Box 7201
Raleigh, North Carolina 27695-7201

July 24, 2008

Mr. J. Christopher Bey
c/o Sharon Bey-Christopher, Esq.
Managing Attorney
Legal Aid of North Carolina, Inc.
P.O. Box 2688
Wilson, North Carolina 27894-2688

Subject: Public Information Requests for the Government of the State of North Carolina and Government of the United States of America

Dear Sir:

Per your request, North Carolina State University is providing the following information: (i) The North Carolina State University Facility Profile and Ten-Year Capital Plan; (ii) Report on Residence

Hall Inspection for mold[, dated] January 2004 (attached); (iii) NC State had several projects involving Wood Residence Hall over the past several years. It is not clear which project you are referencing. Below is a list of the projects for Wood Residence Hall. Please indicate which one you are referring to: Wood Residence Hall HVAC Controls Installation; Wood Residence Hall Roof Replacement; Wood Residence Hall A&B Stairwell Repairs; Wood, Turlington, Alexander, Gold, Syme & Welch – Comprehensive Renovations

Sincerely,
/s/ CHARLES D. LEFFLER
Charles D. Leffler
Vice Chancellor for Finance and Business

CDL/leb

Attachment

MEMORANDUM

North Carolina State University
Environmental Health & Safety Center
Campus Post Office Box 8007
Raleigh, North Carolina 27695-8007

[January, 2004]

To: Gary Thompson, Asst. Director, Facilities Operations – Residence Life
From: Bruce L. MacDonald, Health & Safety Manager
Re: Residence Hall Inspection for Mold

On January 5, 2004, we inspected a number of Residence Life rooms that reported having a "mold" problem some time during the past year. The list of areas inspected and the results of our findings is attached in an Excel spreadsheet. Also, I have attached pictures of areas that did show signs of mold growing.

Overall, I did not see that there are any major "mold" issues in the areas we visited. Residence Life maintenance staff appears to be very responsive to complaints submitted by the resident when the resident felt there was an issue with mold.

Most areas that had previous complaints were free of any visible mold. In some cases, we had a difficult time determining "mold growing every where" when the room had no source of moisture and no signs that mold was growing. Since the students are on vacation[,] we could not ask them what they perceived was "mold" in their room.

There are some buildings that I felt will be a continuing challenge since little can be done to control humidity and temperature in the rooms. One such area is the Avent Ferry complex. There are many rooms where the outside air can penetrate into the room bringing in the high humidity from outside on hot, humid days. The walls are cinder block construction. The students tend to keep the room temperature below 70 [degrees Fahrenheit]. The combination of high humidity and low temperatures results in moisture on the walls. This is an ideal situation for mold to grow.

It is my understanding that whenever a student calls in about mold[,] your staff is quick to respond in cleaning up the site. Fast response minimizes the spread of the mold.

Another area where mold is growing that will be difficult to control is in the shower area. The ventilation in the bathroom is minimal to control the humidity built up from individuals [showering]. The best that can be done is to continue to clean these areas as mold is identified.

Two areas were identified with moisture underneath the floor tile. In one case, a shower had leaked and water infiltrated the corner of the room. The shower leak was fixed stopping any further water infiltration.

The other area with moisture below the floor tile is a result of water infiltrating a corner of the room near the windows. The water is infiltrating because of structural issues with the outside façade.

Water underneath the tile will not cause a mold issue but will eventually lift the tiles off of the floor and will need to be replaced.

Ceiling tile that has water stains or has mold growing as noted on the spreadsheet need to be replaced. Efforts should be made to resolve the water leaking from the riser valve in Carroll.

As a side note[,] I want to point out that there is little evidence that supports a cause and effect relationship between the presence of mold and adverse health effects. More controlled studies are needed before we know if any relationship does exist.

In conclusion, I do not see any evidence that there is a significant mold issue in the Residence Halls. Where I did see mold where I would have expected - in the shower area. The response by your staff is prompt to clean up, replace or repair suspected mold issues which quickly mitigates any potential issues escalating.

If you would like me to tour the Residence Halls again in the spring or early summer[,] let me know. It may be helpful to see what happens when we have high humid days.

APPENDIX L

LETTER

North Carolina State University
Office of Legal Affairs
Campus Post Office Box 7008
Raleigh, North Carolina 27695-7008

August 15, 2008

Mr. J. Christopher Bey
c/o Sharon Bey-Christopher, Esq.
Managing Attorney
Legal Aid of North Carolina, Inc.
108 Gold Street, East
P.O. Box 2688
Wilson, North Carolina 27894-2688

RE: your August 7 and 11 letters to Charles Leffler

Dear Mr. Bey:

Yesterday[,] Kevin MacNaughton brought me copies of your August 7 and August 11 letters to Charles Leffler, and asked me about response. As the Associate Vice Chancellor for Facilities, Mr. MacNaughton is responding to your request for records on facilities at NC State – his latest response should be mailed out next week. However, your "Request Item Number Ten" involves records that are not in his custody. That is why they have not provided a response to those records. Most records that fall under Request Item Number Ten are not in my custody either, but I've agreed to coordinate a

reasonable response. . . . Let me suggest that we seek some reasonable and practical limits on what appears to be an overly broad request. . . . I do have records in my custody that relate to your failed tort claim against NC State. . . . Finally, please address any future records request to me, and specify which office you want the records from. I'll forward the request to that office and advise them on their obligations with respect to responding. .

Sincerely,
/s/ DAVID T. DROOZ
David T. Drooz
Senior Associate General Counsel

cc: Tim Luckadoo
Kevin MacNaughton

LETTER

North Carolina State University
Office of Finance and Business
Division of Facilities
Holladay Hall
Campus Post Office Box 7232
Raleigh, North Carolina 27695-7232

August 18, 2008

Mr. J. Christopher Bey
c/o Sharon Bey-Christopher, Esq.
Managing Attorney
Legal Aid of North Carolina, Inc.
P.O. Box 2688
Wilson, North Carolina 27894-2688

Subject: Public Information Requests for the Government of the State of North Carolina and Government of the United States of America

Dear Sir:

This is a response to both your August 7, 2008 and follow-up August 11, 2008 letters address[ed] to Vice Chancellor Leffler. A copy of the inspection and investigative reports you have requested related to Wood Hall and the Facility Profile are attached [Capital Equity/Adequacy Study Online Questionnaire . . . Total Building Data Cost Summary for Facility Deficiency Correction: $1,430,463.00]. Wood Hall does not appear as a project in the Facility Profile because the ratio of deficiencies to the building value fell below the

threshold (35%) established for inclusion in a Facility Profile. The funds used to address deferred maintenance in residence halls at NC State come from housing receipts and therefore this work was not included in the capital funding allocations proposed and approved as part of the 2000 Higher Education Bond program.

There are no other reports related to investigations of mold in Wood Hall.

The construction start and completion dates associated with the projects listed in my previous response are as follows: Wood Residence Hall Roof Replacement: 5/20/2002 – 7/31/2002; Wood Residence Hall HVAC Controls Installation: 4/1/2003 – 7/30/2003; Wood [Residence Hall] Comprehensive Renovations: 1/10/2006 – 10/29/2007; Wood Residence Hall A&B Stairwell Repairs: 6/2/2008-8/5/2008

There is not an existing assembled list of associated documentation related to these projects.

Sincerely,
/s/ KEVIN MACNAUGHTON
Kevin MacNaughton
Associate Vice Chancellor for Facilities

APPENDIX M

LETTER

North Carolina State University
Office of Legal Affairs
Campus Post Office Box 7008
Raleigh, North Carolina 27695-7008

September 2, 2008

Mr. J. Christopher Bey
c/o Sharon Bey-Christopher, Esq.
Managing Attorney
Legal Aid of North Carolina, Inc.
108 Gold Street, East
P.O. Box 2688
Wilson, North Carolina 27894-2688

Dear Mr. Bey:

. . . [R]ecords . . . from . . . Student Conduct, Student Health Services, Registration & Records, and Human Resources . . . are enclosed. . . . [T]he University of North Carolina General Administration is the custodian of the "Facility Profile and Ten-Year Capital Plan" documentation. . . . [A] rough estimate of the papers associated with that student is 9,000 pages . . . .

Sincerely,
/s/ DAVID T. DROOZ
David T. Drooz
Senior Associate General Counsel

LETTER

North Carolina State University
Office of Legal Affairs
Campus Post Office Box 7008
Raleigh, North Carolina 27695-7008

September 3, 2008

Mr. J. Christopher Bey
c/o Sharon Bey-Christopher, Esq.
Managing Attorney
Legal Aid of North Carolina, Inc.
108 Gold Street, East
P.O. Box 2688
Wilson, North Carolina 27894-2688

Dear Mr. Bey:

. . . Facilities staff reports that Wood [R]esidence [H]all renovation records are part of a multi-hall renovation project . . . [with an] [e]stimated volume . . . [of] about 16,000 pages . . .

Sincerely,
/s/ DAVID T. DROOZ
David T. Drooz
Senior Associate General Counsel

cc: Tim Luckadoo
Kevin MacNaughton

APPENDIX N

LETTER

North Carolina State University
Office of Legal Affairs
Campus Post Office Box 7008
Raleigh, North Carolina 27695-7008

September 24, 2008

Mr. J. Christopher Bey
c/o Sharon Bey-Christopher, Esq.
Managing Attorney
Legal Aid of North Carolina, Inc.
108 Gold Street, East
P.O. Box 2688
Wilson, North Carolina 27894-2688

Dear Mr. Bey:

. . . The voluminous Facility Profile and Renovation Project documents that you want to view onsite are not at NC State. You may contact Terry Feravich, the UNC General Administration Associate Vice President for Finance and University Property Officer, regarding that request. . . .

Sincerely,
/s/ DAVID T. DROOZ
David T. Drooz
Senior Associate General Counsel

LETTER

North Carolina State University
Office of Legal Affairs
Campus Post Office Box 7008
Raleigh, North Carolina 27695-7008

September 30, 2008

Mr. J. Christopher Bey
c/o Sharon Bey-Christopher, Esq.
Managing Attorney
Legal Aid of North Carolina, Inc.
108 Gold Street, East
P.O. Box 2688
Wilson, North Carolina 27894-2688

Dear Mr. Bey:

. . . [The documents requested from] University Housing [are] enclosed . . . .

Sincerely,
/s/ DAVID T. DROOZ
David T. Drooz
Senior Associate General Counsel

cc: Tim Luckadoo

ELECTRONIC MAIL CORRESPONDENCE

September 17, 2003, 11:58AM

From: Tim Luckadoo
To: Nancy Jenkins, and Tom Stafford
CC: Gary Thompson, Susan Grant, and Tim Blair
Subject: Wood Hall

Here is what we know so far: [NAME REDACTED] submitted a work request late afternoon on August 25 related to mold in his room. The next day, August 26, two maintenance staff went to the room, cleaned the AC unit and performed other standard maintenance on that unit. On August 28, [NAME REDACTED] brought a doctor's note to the RD related to his respiratory irritation. We sent maintenance staff member[s] back to the room to look for any signs of mold, etc., but none were found.

Since move-in, we have had four complaints related to mold in Wood Hall. All have been resolved.

The filters in all residence halls are changed four times per year. The Wood filters were changed in June and are scheduled to be changed at the end of September. This meets or exceeds the manufacturers recommendations. When we change filters, we also check the units and place [a] tablet in the drip pan to retard the growth of algae, etc.

Tim Blair will contact [NAME REDACTED] today to discuss his concerns, and will contact the reporter to correct factual inaccuracies with the story. I will let you know what else we find. Thanks[,] Tim

ELECTRONIC MAIL CORRESPONDENCE

September 17, 2003, 12:25PM

From: Gary Thompson
To: Susan Grant, Tim Blair, and Tim Luckadoo
Subject: FYI

FYI: After looking at the Technician photo, we . . . believe that what is shown reflects typical condition of corrosion, dust, dirt, discoloration, and yes, some mold that is not uncommon in units that are 20+ years old. We have no faith that any maintenance was done to the units for the first 10 years. This is not to say that we are now neglecting the maintenance for we are in and around these units on a very frequent basis all year round. We do have a system that includes vacuuming the units when we change filters. We have discontinued the use of chemical spray as a typical maintenance protocol due to the sensitivity of our students an chemical reactions. We have proposed and obtained pricing on replacing the original fan coil units, however the project was placed at a lower priority for the sake of other projects. In addition, we have a price of . . . [about] $50,000 to replace both chiller units with a new unit should we want to pursue that avenue. What else do we need? GT.

LETTER

North Carolina State University
University Housing and Greek Life
Campus Post Office Box 7312
Raleigh, North Carolina 27695-7315

December 18, 2003

North Carolina Department of Labor
Division of Occupational Safety & Health
1101 Mail Service Center
Raleigh, North Carolina 276911-1101

Attn: Ron Wells

Re: OSH Complaint 204760730

Dear Mr. Wells:

This is in reference to your letter of December 18, 2003, regarding a report of possible health and/or safety hazards in our work environment. Specifically, the alleged violation relates to uncorrected mold and mildew growth in the residence halls causing health problems for employees and students.

I have attached a document that describes our mold prevention and response protocols. We work closely with the University Environmental Health and Safety Department, as well as University Facilities Operations to provide ongoing inspections and preventative maintenance for our facilities. Our facilities maintenance mechanics and housekeeping services respond to any reported complaints.

In October of 2002, a Wood Hall Resident Advisor submitted a written report to his supervisor requesting that room heating and air-conditioning units be serviced due to his concerns about possible mold in that building. All units were serviced shortly thereafter. In September of 2003, this Resident Advisor complained that there was mold in his residence hall room. He had not reported any mold concerns in August when he moved into his room. His room was cleaned, the heating and air-conditioning unit was serviced, and there have been no further complaints.

I hope this information will be sufficient. . . .

Sincerely,
/s/ TIMOTHY R. LUCKADOO
Timothy R. Luckadoo, Ph.D.
Associate Vice Chancellor for Student Affairs and Director of University Housing

LETTER

North Carolina Department of Labor
Division of Occupational Safety and Health
Raleigh Field Office
1101 Mail Service Center
Raleigh, North Carolina 27699-1101

July 20, 2004

Timothy R. Luckadoo, Ph.D.
North Carolina State University
Univesity Housing
1112 Pullen Hall
Raleigh, North Carolina 27695

Re: OSH Complaint 204760730

Dear Mr. Luckadoo

. . . Based on the information you have provided, OSHNC feels the case can be closed on the grounds that the alleged hazardous conditions have been corrected or no longer exist. . . .

Sincerely,
/s/ ANITA HENDERSON
For Ron Wells,
Safety and Health Compliance Supervisor

MEMORANDUM

North Carolina State University
Office of Legal Affairs
Campus Post Office Box 7008
Raleigh, North Carolina 27695-7008

To: Tim Luckadoo, Tim Blair, David Rainer, and Bruce MacDonald
From: David Drooz
Date: June 9, 2006
Re: [T]ort claim related to mold in Housing

Attached is the first set of discovery requests from the plaintiff in this case. Please draft responses to the extent you have the information, and sent them to me electronically. Please share with anyone else at NC State who may have the information (Gary Thompson? Others?).

The deadline for the response has been extended by the Industrial Commission to June 30. I'll need your draft responses by June 23 at the latest so there is time to discuss them, and so the Attorney General will have time to discuss them as well.

A lot of questions and requests for production of documents are overbroad, irrelevant, or abusive. Please do not waste your time trying to respond where it makes no sense in the context of a claim that mold in Wood Hall impairs his health. For instance, I don't think information about other buildings at NC State is pertinent. . . .

I have asked the Attorney General's Tort Claim section to (1) let us know what questions/requests we do not need to answer, and (2) file a motion to dismiss on the grounds that [the

Plaintiff] was an employee at the time so his exclusive remedy should have been a Workers Comp[ensation] claim, not a tort claim. I don't know if that will be a viable motion[,] but the Attorney General's office said they would consider doing it.

cc: Deborah Harvey
Dahr Joseph Tanoury, Asst. Attorney General

ATTACHMENT

[Draft Response to Plaintiff's First Set of] Interrogatories [and Request for Production of Documents]

. . . [INTERROGATORY:] Describe fully and completely the renovations planned for Wood Hall, identify and state any and all contractors and architects with contractual agreements with North Carolina State University to renovate said building, and explain fully the reason for allowing students to remain in said building before and during renovations after the press release announcing said renovations. ANSWER: Renovation to Wood Hall (May 2006 – August 2007) [will include] installation of sprinkler system, replacement of individual fan coil units [in the HVAC system], and installation of make-up air [system as part of the HVAC system] to comply with code changes since Wood Hall was built. [The] Architect [is] Stanford White Associates [and the] [c]ontractor [is] Centex. [The] [b]uilding[s] will be renovated in two stages. In stage one, the [one] building will be renovated from May 2006 [to] December 2006. The [other] building will house conference groups during the summer and will house students during the fall 2006 semester. In December, students will be moved from the . . . building [still requiring renovations] to the newly renovated . . . building. Renovation will then begin in the . . . building [still requiring renovations] and will be completed prior to the start of the fall 2007 academic semester. Since [the] buildings are separate [and free standing], we are able to keep

renovation activities confined to one building while students are residing in the other. . .

[INTERROGATORY:] Describe fully and completely the sequence of events that has let to the announced renovation of Wood Hall in the fall of 2006 and spring 2007, while also identifying each person involved in the process and evaluation of said facilities, and identify and describe fully and completely any and all reports, records, documents, memoranda, and files produced, created, maintained and/or discarded relative to this matter. ANSWER: The renovation has been part of the University Housing 10-year Facilities [P]lan. The installation of the sprinkler system is per the State mandate [requiring that] . . . all residence hall[s] [have sprinkler systems]. The replacement of the fan coil units is related to the 20-year life cycle of the units. The introduction of the make-up air system is required due to current state codes. Individuals involved in the development of the University Housing 10-year Facilities Plan include: Susan Grant, Director[,] Gary Thompson, Associate Director for Finance[,] Pete Burke, Associate Director for Finance[,] Jim Pappenhagen, Associate Director for Administration[,] Gay Perez, Associate Director for University Apartments (formerly Associate Director for West Campus)[,] Kathleen Ruppe, Associate Director for Central Campus[,] Tim Blair Associate Director for East Campus[,] Hany Younes, Associate Director for Graduate and Family Housing (retired). . . .